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In the

Supreme Court of the United States

October Term, 1985

JAPAN WHALING ASSOCIATION and JAPAN FISHERIES ASSOCIATION

Petitioners,

vs.

AMERICAN CETACEAN SOCIETY, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

of counsel
WILLIAM H. ALLEN
Covington & Burling
1201 Pa. Ave., NW
Washington, DC
20044

STEVEN R. PERLES
Counsel of Record
SCOTT C. WHITNEY
1320 19th St., NW
Washington, DC
20036
(202) 833-2170

Attorneys for Petitioners

16 pp

QUESTIONS PRESENTED

1. Whether domestic statutes require the Secretary of Commerce to determine and certify that, because Japanese nationals are taking certain species of whales in excess of international quotas from which Japan is lawfully exempt, the Japanese nationals are "diminish[ing] the effectiveness" of the international convention under which the quotas were established, even though:

> (a) The taking of whales was in reliance on and in accordance with an agreement between the United States and Japan;
>
> (b) by that agreement Japan undertook to cease commercial whaling operations in 1988 and to phase down its operations in the interim; and
>
> (c) on the basis of these undertakings and scientific evidence the Secretary concluded that the interim takings would not "diminish the effectiveness" of the international convention within the meaning of the United States statutes.

2. Whether a federal court may and, if it may, whether in the circumstances of this case it should order a Cabinet officer to make a determination and certification under a statute that he is charged with administering when the result of the certification would be to breach an agreement between the United States and a friendly foreign nation and to impose a severe punitive sanction on Japanese nationals for actions taken in reliance on that agreement.

THE PARTIES

The petitioners, named in the caption, were defendant-intervenors and appellants below. The plaintiffs and appellees below, respondents in this Court, are -- in addition to the American Cetacean Society named in the caption -- Animal Protection Institute of America, Animal Welfare Institute, Center for Environmental Education, Connecticut Cetacean Society, Defenders of Wildlife, Friends of the Earth, The Fund for Animals, Greenpeace U.S.A., Thomas Garrett, The Humane Society of the United States, International Fund for Animal Welfare, and The Whale Center. The defendants and appellants below, nominally respondents insofar as this petition is concerned, are Secretary of Commerce Malcolm Baldrige and Secretary of State George Shultz.

TABLE OF CONTENTS

	Page
Questions Presented	i
The Parties	ii
Opinions Below	1
Jurisdiction	2
Statutory and Treaty Provisions Involved	2
Statement	2
The Convention and the Whale Quotas	5
The United States Statutes	6
The Murazumi-Baldrige Agreement	8
The Proceedings Below	10
Reasons for Granting the Writ	12
I. The Statutory Question	15
A. Deference Is Owing to the Secretary's Interpretation of the Statute	15
B. Especially Great Deference Is Owing Because This Case Involves the Conduct of Foreign Affairs	18
C. Application of the Statutes to Japan Derogates United States Treaty Obligatio	20
D. The Court of Appeals Construction of the Statutes Results in an Impermissible Delegation of Decisionmaking Power	22
II. The Question of Justiciability and Equitable Discretion	23

A. Courts Should Not Entangle Themselves in Delicate Issues of Foreign Relations..... 24

B. In the Exercise of Equitable Discretion the Judiciary Should Not Compel the Executive to Dishonor an Executive Agreement..... 25

Conclusion 27

APPENDIX A

Opinion of the United States Court of Appeals for the District of Columbia Circuit..... A1

APPENDIX B

Opinion and Order of the United States District Court of the District of Columbia..... B1

APPENDIX C

Orders of the United States Court of Appeals for the District of Columbia Circuit Denying Rehearin..... C1

APPENDIX D

Statutory and Treaty Provisions Involved..... D1

Murazumi-Baldrige Agreement, and Supplements D1

International Convention for the Regulation of Whaling..... D13

Pelly Amendment, 22 U.S.C. § 1978(a)..... D16

Packwood-Magnuson Amendment, 16 U.S.C. § 1821..... D18

TABLE OF AUTHORITIES

Cases	Page
A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)	23
Baker v. Carr, 369 U.S. 186 (1962)	24
Carter v. Carter Coal Co., 298 U.S. 238 (1936)	23
Chae Chan Ping v. United States, 130 U.S. 581 (1889)	23
Chemical Manufacturers Association v. Natural Resources Defense Council, 105 S. Ct. 1102 (1985)	17
Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 104 S. Ct. 2778 (1984)	16, 17
Chew Heong v. United States, 112 U.S. 536 (1884)	21
FEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27 (1981)	17
FPC v. Tuscarora Indian Nation, 362 U.S. 99 (1960)	13
Harrisonville v. W.S. Dickey Clay Mfg. Co., 289 U.S. (1933)	26
Hecht Co. v. Bowles, 321 U.S. 321 (1944)	26
Industrial Union Department v. American Petroleum Institute, 448 U.S. 607 (1980)	23
Jordan v. Tashiro, 278 U.S. 123 (1928)	21
Marbury v. Madison, 1 Cranch 137 (1803)	24
Panama Refining Corp. v. Ryan, 293 U.S. 388 (1935)	23
Train v. Natural Resources Defense Council, 421 U.S. 60 (1975)	17
Trans World Airlines, Inc. v. Franklin Mint Corp., 104 S. Ct. 1776 (1984)	22
Tucker v. Alexandroff, 183 U.S. 424 (1902)	21

United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) 19, 24

Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982) ... 26

Whitehouse v. Illinois Central Railroad, 349 U.S. 366 (1955) 26

Treaties and Executive Agreements

The Murazumi-Baldrige Agreement, United States-Japan, Nov. 13, 1984 ..... 2, 8-10

International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, 161 U.S.T. 72, T.I.A.S. No. 1949 ..... 2, 5

Statutes

22 U.S.C. § 1978(a) 2, 7, 15

16 U.S.C. § 1821(e)(2) 2, 7, 15

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vs.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Japan Whaling Association and Japan Fisheries Association respectfully pray that a writ of certiorari issue to review the judgment of the court of appeals entered in this case on August 6, 1985.

OPINIONS BELOW

The majority and dissenting opinions of the court of appeals are reported at 768 F.2d 426 and

are annexed hereto as Appendix A. The district court opinion is reported at 604 F. Supp. 1398 and is annexed hereto as Appendix B.

JURISDICTION

The judgment of the court of appeals was entered on August 6, 1985. A timely petition for rehearing and suggestion for a rehearing *en banc* was denied on October 11, 1985. The order denying rehearing is annexed hereto as Appendix C. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND TREATY PROVISIONS INVOLVED

In Appendix D there are set forth, in full, the agreement of November 13, 1984, between the United States and Japan (the Murazumi-Baldrige Agreement) and a supplement to that agreement; and, in relevant part, provisions of the International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, 161 U.S.T. 72, T.I.A.S. No. 1949, of the so-called Pelly Amendment, 85 Stat. 768, 22 U.S.C. § 1978(a), and of the so-called Packwood-Magnuson Amendment, 90 Stat. 337, 16 U.S.C. § 1821(e)(2).

STATEMENT

This case concerns an order of the district court, affirmed by a divided panel of the court of appeals, that if allowed to stand would place the United States in breach of an agreement with Japan. In that agreement, Japan made irrevocable concessions, satisfactory to the responsible

Executive Branch official, intended to avoid precisely the punitive sanction that the court's order would force the Executive Branch to impose.

This extraordinary exercise of judicial power arises out of a controversy over commercial whaling operations. The International Whaling Commission (IWC), established under the International Convention for the Regulation of Whaling (ICRW), has fixed quotas that diminish to zero next year for the commercial harvest of certain species of whales. Japan, a party to the Convention, has filed formal objections to these quotas. These objections exempt Japan from the quotas and relieve it of any obligation at international law to abide by them.

United States domestic statutes, the so-called Pelly Amendment and Packwood-Magnuson Amendment, call for the Secretary of Commerce to determine whether nationals of a foreign country are conducting whaling operations in a manner or under circumstances which "diminish the effectiveness" of the ICRW. A certification by the Secretary that foreign nationals are so conducting their whaling operations results in a severe sanction, a reduction of at least 50 percent in the quantity of fish its nationals can take in United States waters. Such a sanction would cost Japanese fishing interests $1.8 billion.

Although Japan is lawfully exempt from the quotas, the Secretary of Commerce apparently believed himself empowered to certify the whaling operations of Japanese nationals if he determined that their taking of whales in excess of the quotas would diminish the effectiveness of the ICRW. Therefore, in order to avoid a diplomatic confrontation with the United States, Japan

negotiated and concluded an agreement with the Secretary, acting for the United States. The United States undertook that there would be no certification, in exchange for major pro-whale conservation undertakings by Japan. Japan agreed (1) to withdraw its formal objections to the IWC quotas; (2) to limit its harvest of whales over the next two years to numbers that, upon scientific evidence considered by the Secretary, would not endanger the species of whales involved; and (3) to cease commercial whaling altogether in 1988. In partial performance of its agreement, Japan has withdrawn one of its quota objections, which under the ICRW is an irrevocable act.

The judgment of which review is sought rests on the holding that when Japanese whalers, under authorization of their government granted in explicit reliance on the agreement between the United States and Japan, take whales in excess of the international quotas, they are *ipso facto* engaging in conduct that diminishes the effectiveness of the ICRW. It would direct the Secretary of Commerce so to determine and certify, and thus automatically trigger severe economic sanction against Japan and its fishermen. It would direct the Secretary to make such a certification despite the fact that Japan is not bound by the quotas and despite the Secretary's determination that the limited interim whale harvest by Japan would result in no diminution of the effectiveness of the international whaling regime, especially in light of the large concessions made by Japan in its bilateral agreement with the United States.

The Convention and the Whale Quotas

The International Convention for the Regulation of Whaling, signed in 1946 and entered into force for the United States in 1948, established an international system of whale harvest management. Its purposes and objectives are "to protect all species of whales from further overfishing" while recognizing that "whale stocks are susceptible of natural increases if whaling is properly regulated, and that increases in the size of whale stocks will permit increases in the numbers of whales that may be captured without endangering these natural resources." Conservation measures were to be undertaken "without causing widespread economic and nutritional distress . . . and thus [would] make possible the orderly development of the whaling industry." International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, 161 U.S.T. 72, T.I.A.S. No. 1949, Preamble (App. D13-14).

The International Whaling Commission created by the ICRW establishes and includes in its so-called "Schedule" such matters as annual whaling quotas, the whaling seasons, and regulations governing permissible whaling methods. All amendments to the Schedule, including whaling quotas, must comply with Article V-2 of the ICRW, which requires, *inter alia*, findings that an amendment (1) is "necessary to carry out the objectives and purposes of this Convention and to provide for the conservation, development, and optimum utilization of the whale resources," (2) is "based on scientific findings," and (3) "take[s] into consideration the interests of the consumers of whale products and the whaling industry." (App. D14.)

Under the terms of Article V-3 of the ICRW, any government that presents an objection to the IWC within 90 days of being notified of the adoption of such an amendment is exempt from the new quota or other regulation. The right to present an objection is absolute and unqualified. (App. D14-15.)

In 1981, the IWC amended the Schedule for the western division stock of North Pacific sperm whales to establish what was effectively a zero catch limit. The IWC adopted this amendment without making the three findings that Article V-2 of the ICRW requires. On November 9, 1981, Japan filed a timely objection to this amendment. Thereafter, the IWC reconsidered and agreed to allow Japan to take 450 sperm whales in the 1982-83 coastal season (the sperm whale season has historically run from August of each year through March of the following year) and 400 sperm whales in the 1983-84 coastal season. The IWC failed to establish a quota for any period thereafter, thereby resurrecting for Japan (and maintaining for other countries) the zero catch limit for succeeding years. Japan's 1981 objection was still in force as to this zero catch limit so that it was free to take sperm whales in the 1984-85 season and thereafter without violating the ICRW.

In 1982, the IWC imposed a five-year moratorium on all whaling beginning in 1986. Japan, along with the Soviet Union and Norway, filed an obiection to this action.

The United States Statutes

Two United States statutes bear on this case. In 1971, Congress enacted the so-called Pelly

Amendment to the Fishermen's Protective Act, which is Section 8(a) of that statute. 85 Stat. 768, 22 U.S.C. § 1978(a) (App. D16-17). Its operative provision reads:

> [8](a)(1) When the Secretary of Commerce determines that nationals of a foreign country, directly or indirectly, are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program, the Secretary of Commerce shall certify such fact to the President.

The President, upon receipt of certification by the Secretary of Commerce, is authorized by Section 8(a)(3) to direct the Secretary of the Treasury (the Customs Service is a Treasury agency) to prohibit the importation of fish products from the offending country for a period that the President decides is appropriate and to the extent that such a prohibition is permitted by the General Agreement on Tariffs and Trade.

In 1979, Congress enacted the Packwood-Magnuson Amendment to the Magnuson Fishery Conservation and Management Act, as Section 201(e)(2). 90 Stat. 337, 16 U.S.C. § 1821(e)(2) (App. D18). The Packwood-Magnuson Amendment deals specifically with whaling and with the ICRW. It provides for an automatic sanction, the reduction of at least 50 percent of a country's allocation of fish that it can harvest in the United States fishery conservation zone, if the Secretary of Commerce certifies that nationals of that country are whaling in a way that diminishes the effectiveness of the ICRW.

Certifications under either the Pelly Amendment or the Packwood-Magnuson Amendment have been rare, and sanctions have been imposed only once. In the usual case, the possibility of United States certification and sanction has led to negotiations between the United States and a country whose nationals are suspected of activity that diminishes the effectiveness of the ICRW (or some other ocean resources conservation program), and to the conclusion of an agreement that, in the view of the United States, furthers conservation objectives, thereby eliminating the need for sanction. And that is what happened here.

The Murazumi-Baldrige Agreement

Before the 1984-85 whaling season, Japan entered into discussions with United States officials, including the Secretary of Commerce and the Secretary of State, in an attempt to resolve differences between the two nations over whaling issues. These discussions resulted in an exchange of letters between Yasushi Murazumi, charge d'affaires of Japan in the United States, and the Secretary of Commerce. (App. D1-8.)

One part of their agreement concerns the sperm whale quota specifically. Japan agreed to withdraw its objection to that quota, and the United States agreed in exchange that the Japanese could take up to 400 sperm whales in each of the 1984-85 and 1985-86 coastal seasons without "diminish[ing] the effectiveness" of the ICRW. Secretary Baldrige described in a letter to Minister Murazumi the United States' understanding and the bases for it (App. D6-7):

> After consulting with the United States Commissioner to the International Whaling Commission (IWC), I have concluded that commercial harvest of whales by Japanese nationals within the limits and under the circumstances set forth in the Summary of Discussions attached to your letter [*i.e.*, 400 sperm whales in each of the 1984 and 1985 seasons] would not diminish the effectiveness of the International Convention for the Regulation of Whaling, 1946, or its conservation program.
>
> The reports of the IWC's Scientific Committee, as well as the IWC's 1982 decision to permit quotas of 450 and 400 whales for the 1982 and 1983 coastal sperm whaling seasons, respectively, indicate that sperm whaling in accordance with paragraph 1 of the Summary of Discussions attached to your letter is not inconsistent with the IWC's essential conservation purposes.

On December 11, 1984, the Government of Japan, pursuant to its undertaking in the Murazumi-Baldrige Agreement, filed a withdrawal of its objection to the sperm whale quota effective April 1, 1988. This withdrawal, by the terms of the ICRW, is irrevocable. (*See* App. A4.)

There is a second, longer-range part of the Murazumi-Baldrige Agreement. Japan agreed to end all commercial whaling by April 1, 1988. The United States, on its side, agreed that the Japanese may take up to 200 sperm whales in each of the 1986-87 and 1987-88 coastal seasons and may take minke and Bryde's whales in those years subject to limitations approved by the United States and

Japan, without imposition of the sanction provided by the Pelly and Packwood-Magnuson Amendments. Japan, by a diplomatic note dated April 5, 1985 (App. D9-12), has confirmed that, within five days of a judgment in this case in favor of the United States, it will withdraw its objection to the IWC moratorium, effective April 1, 1988, and thereby commit itself irrevocably to the cessation of commercial whaling.

Members of the petitioner Japan Whaling Association have taken whales in accordance with the Murazumi-Baldrige Agreement beginning last fall. Throughout the pendency of this litigation and in spite of the adverse decisions below, petitioner JWA's members have strictly adhered to the limitations of the Murazumi-Baldrige Agreement.

The Proceedings Below

This action was brought in November 1984 before agreement was reached between the United States and Japan. The plaintiffs are twelve animal welfare and conservation organizations and a former United States deputy commissioner to the IWC. The defendants are Secretary of Commerce Baldrige and Secretary of State Shultz. These petitioners, the Japan Fisheries Association and the Japan Whaling Association, intervened as a matter of right on the side of the two United States Cabinet officers.

The district court, Judge Richey, heard the case on cross-motions for summary judgment by each of the three parties after the Murazumi-Baldrige agreement was concluded. Judge Richey granted the plaintiffs' motion. He held that the phrase "diminish the effectiveness" of the ICRW as used in

the Pelly and Packwood-Magnuson Amendments means, in the context of this case, any taking of whales in excess of an ICRW quota. (App. B2.) In Judge Richey's view, the statutes preclude the exercise of judgment by the Secretary of Commerce; he must certify whenever nationals of a country have exceeded an ICRW quota, whatever the circumstances. The district court's judgment therefore directed the Secretary of Commerce to make a certification, in violation of the agreement that the Secretary himself had concluded with the Government of Japan, which would result in the automatic imposition of the Packwood-Magnuson sanction on Japan and its fishing industry.

The court of appeals stayed the district court's judgment and heard the appeal on an expedited basis. It affirmed, agreeing with "the District Court's ultimate conclusion that certification in this case is mandatory, though . . . for slightly different reasons." (App. A2.) On the basis of statements made during the course of congressional consideration of the Pelly and Packwood-Magnuson Amendments, the court of appeals held that, "although in some situations the Secretary has discretion whether to certify, the Secretary is required by law to certify a foreign country whose nationals are harvesting whales in excess of ICRW quotas." (App. A2-3.) Judge Wright's opinion to this effect was joined by the late Judge Tamm.

District Judge Oberdorfer, sitting by designation, dissented. He said that he could not agree that, "in the circumstances of this case, the Pelly Amendment . . . should be construed to impose upon the Secretary of Commerce a ministerial duty to certify Japan solely because it is not adhering to an international whaling quota which is not binding on it." (App. A39.) He also

expressed his doubt that the case, which resulted in "add[ing] the Judicial Branch's voice to this delicate process" of conducting foreign affairs (App. A43), was justiciable; he said further that, even granting justiciability, the equities required that the court abstain from exercising its powers in this situation.

Petitions for rehearing with suggestions for rehearing *en banc* were filed. Four of the seven active circuit judges who considered the *en banc* suggestions stated their "substantial agreement with the views expressed in Judge Oberdorfer's dissent" and would have granted the requested *en banc* rehearing. (App. C4, C8.) Two active circuit judges did not participate. Rehearing *en banc* therefore was denied for want of the majority of all the circuit judges in regular active service, including non-participants, that the court below requires in applying Fed. R. App. P. 35(a).

REASONS FOR GRANTING THE WRIT

A divided panel of the court of appeals has affirmed a judgment of the district court the effect of which is to place the United States in flagrant breach of an international agreement. The agreement is one that would further the United States interest in the conservation of whales because under it Japan would cease all commercial whaling in 1988. In breach of its agreement, the United States would be obliged by the judgment below to reduce by at least half Japan's fishing privileges in United States waters, a sanction that would cost Japanese nationals $1.8 billion. The sanction would result from Japan's reliance on its agreement with the United States in authorizing members of the petitioner Japan Whaling

Association to take whales in numbers to which the United States had agreed.

We leave to the Solicitor General fully to develop, in his separate petition, the need for this Court to review a federal court judgment that trenches so deeply on the conduct of foreign affairs by the responsible branch of government, the Executive Branch. These petitioners emphasize the importance of the case that derives from the threat that the United States must impose punitive sanction on them and their government for conduct in which they engaged in perfect good faith, relying on the solemn public promise of the United States. Only this Court can restore the United States to the ranks of those "great nations" that, Justice Black once reminded us, "like great men, should keep their word." *FPC* v. *Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (dissenting opinion).

The legal issues posed by the case are important in their own right, and the resolution of them by the court below is inconsistent with decisions of this Court. Four judges of the court of appeals, a majority of the judges who participated in the *en banc* vote, thought that the issues were wrongly resolved by the court's panel majority. The "substantial agreement" of these four circuit judges with the views of the dissenting judge, who had no vote in the *en banc* decision, accentuates the necessity for this Court's intervention to ensure respect for its precedents as well as to judge the propriety of the court's remarkable foray into foreign affairs.

The court of appeals held that as a matter of its independent construction of the Pelly and Packwood-Magnuson Amendments Japanese nationals necessarily "diminish the effectiveness" of

the ICRW when they take whales in excess of an ICRW quota by which their country is not bound. The Secretary of Commerce determined on the other hand that, considering the circumstances of the case, including the major whale-conservation concessions that Japan had made and the scientific evidence before him, Japanese whaling within the limits of the Murazumi-Baldrige Agreement would not "diminish the effectiveness" of the ICRW within the meaning of the statutes he administers.

The substitution by the court of appeals of its reading of "diminish the effectiveness" for the Secretary's reasonable if not clearly correct interpretation of the phrase is inconsistent with the numerous decisions of this Court that demand deference to an administering agency's reasonable interpretation of a statute. The inconsistency is heightened in the context of this case, for the scope of executive discretion in administering statutes is largest when the Executive is acting in its special province, foreign affairs. Moreover, the ruling that the statutes require that Japan be subjected to United States sanction for exceeding international whale quotas from which it is exempt by the very terms of the whaling convention to which it and the United States are parties raises a serious question under decisions of the Court calling for the United States to adhere to its treaty commitments in the utmost good faith. Finally, the statutes as construed below would have the United States Congress delegating decisionmaking power to an international body. That construction should be avoided, under this Court's decisions, to avert constitutional doubts.

There is a further question, which goes beyond statutory construction. Judge Oberdorfer, dissenting below, thought that there are serious

questions of justiciability in this case, which involves a matter at the heart of the conduct of the foreign relations of the United States, the integrity of its international agreements. This Court should decide whether, regardless of the right-and-wrong of the statutory question, a court of the United States may or should enter an affirmative injunction in the nature of mandamus commanding a Cabinet officer to breach his very own agreement and impose sanction on a friendly nation that (a) sought to avoid such sanction by making major concessions in the agreement with the United States and (b) in reliance on that very agreement took the actions that, by the decision below, will result in sanction.

I. THE STATUTORY QUESTION

A. Deference Is Owing to the Secretary's Interpretation of the Statute.

The statutes in issue call for a determination by the Secretary of Commerce whether nationals of a foreign country "are conducting fishing [in this case, whaling] operations in a manner or under circumstances which diminish the effectiveness" of an international fishery conservation program, in this case the ICRW. (App. D16, D18.) They do not say that the Secretary is merely to make a mechanical determination whether such nationals have exceeded an ICRW quota in their taking of whales. Congress instead used a phrase, "diminish the effectiveness," of an apparent breadth suitable for a statute administered by a Cabinet officer. Congress underscored its intent to confer on the Secretary discretion appropriate to his office and to the international subject matter of the statutes by not undertaking itself to define the phrase. The statutes thus seem plainly to entail the exercise of

judgment by the Secretary before he makes the certification that, in the case of the ICRW, calls for the most severe automatic sanction on another country.

The Secretary of Commerce in this case satisfied himself that the taking by Japanese whalers of the number of whales allowed under his agreement with the Japanese charge d'affaires would not diminish the effectiveness of the ICRW, even though that taking exceeded ICRW quotas. He thus construed the statutes as enabling him to make a judgment based on all the circumstances and not to be required, as the court below held that he was, to certify any foreign country whose nationals are exceeding ICRW quotas. On the face of the statutes, the Secretary's reading of the undefined statutory phrase seems the correct one. It is at the very least a reasonable one.

This Court has frequently admonished the lower courts in recent years that, when a statute speaks in such general terms as the Pelly and Packwood-Magnuson Amendments do, courts should respect the administrator's interpretation if it is reasonable. In *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council*, 104 S. Ct. 2778 (1984), the Court described the proper approach to a statutory issue when the administering agency has spoken to the meaning of the statute.

In that case, Congress had not defined the meaning of "source" as used in the Clean Air Act in respect of the establishment of new source performance standards in a nonattainment area. The Environmental Protection Agency had adopted a definition that the court of appeals -- the same court of appeals whose judgment is the subject of

this petition -- found to be "inappropriate," and for which it therefore substituted its own definition. This Court reversed. It said, first, that a reviewing court must of course "give effect to the unambiguously expressed intent of Congress" without regard to the administrator's reading of the statute. *Id.* at 2781-82. It cannot be said here that "diminish the effectiveness" (even as illuminated by the secondary sources to which the court below turned for illumination) "unambiguously" expresses the intent that the taking of a single whale or fish in excess of a quota must be certified for the imposition of sanction. Indeed, if anything, it expresses the unambiguous intent to confer on the Secretary the discretion he exercised.

The Court in *Chevron* said second that, where a statute is "ambiguous," the question for a reviewing court is not what is the best resolution of the ambiguity; rather, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 2782. The Court added, seemingly apropos a case such as this where Congress has charged a high-ranking official with administering a broadly-phrased standard: "Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, the court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id. See also Chemical Manufacturers Association* v. *Natural Resources Defense Council*, 105 S. Ct. 1102, 1109 (1985); *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 39 (1981); *Train* v. *Natural Resources Defense Council*, 421 U.S. 60, 75 (1975).

This is the paradigm case for deference to a reasonable administrative interpretation (if not for affirming the Secretary's interpretation as clearly correct). As the opinion below acknowledges, Congress did not define what conduct should be considered to "diminish the effectiveness" of the ICRW and thereby trigger certification and sanction. Judge Wright found the basis for his definition not in the words of the statutes but in items that he cited from their legislative history. (App. A20-36.) The history, even as it is recited in his opinion, is not compelling. A history with such conflicting strands cannot be made the basis for saying that Congress had on the specific point at issue the unambiguous intent that the court below attributed to it. No more can it be said that, in the absence of such a clear intent, the Secretary's interpretation of Congress' undefined words was not reasonable.

B. Especially Great Deference Is Owing Because This Case Involves the Conduct of Foreign Affairs.

Judge Oberdorfer, dissenting below, found in the majority's analysis of the legislative history "an impressive, but far from conclusive, demonstration that congressional sponsors of the Pelly Amendment intended that the Secretary certify any deviation by a nation or its nationals from a Commission quota." (App. A45.) He pointed to ambiguities and uncertainties in the very history cited by the majority that left it unclear -- at worst -- whether any of the congressional sponsors would have intended that in the circumstances of this case Japan should be certified as diminishing the effectiveness of the ICRW. But he said that, despite these infirmities, he might be able to endorse the majority's decision based on secondary

evidence of the congressional intent if solely domestic affairs were involved. (App. A46.)

That was not this case, however. It involved international relations. More even than in the usual domestic case, courts are bound to defer to the Executive Branch reading of statutes that bear on the conduct by Executive Branch officials of the foreign affairs of the nation. (*See* App. A45-47.) Foreign affairs is the province of the Executive Branch. The issue in the leading case on this subject, *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), was the validity of a congressional delegation of power to the Executive in a foreign affairs matter. This Court remarked that "if, in the maintenance of our international relations, embarrassment -- perhaps serious embarrassment -- is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved." *Id.* at 320.

Congress enacted the Pelly and Packwood-Magnuson Amendments with the understanding that it was legislating concerning executive action "within the international field." (*See* App. A32 n.20 (remarks of Rep. Breaux)). Certainly President Carter, whose signature made the Packwood-Magnuson Amendment law, understood that, as the final actor in the legislative process, he was not confining his Cabinet officers to the ministerial function the court below assigns to the Secretary of Commerce. In signing the bill that included the amendment he said: "With regard to both the Packwood-Magnuson and Pelly Amendments the

Secretaries of Commerce and the Interior should work with the Secretary of State to take prompt action to ensure that all avenues of negotiation are fully exhausted before certification is made against any foreign nation." 15 Weekly Comp. Pres. Doc. 1435 (Aug. 15, 1979). That presidential statement, ignored by the court below, is more nearly to the point than any of the items of legislative history it cited.

C. Application of the Statutes to Japan Derogates United States Treaty Obligations.

Japan has an unchallenged and unchallengeable right to free itself of quotas established by the IWC by filing objections to them. It has exercised this right in the case of the quotas that are at issue. Nevertheless, the court below has construed the statutes as requiring United States officials to impose sanction on Japan for exceeding those quotas. In doing so it relied on statements of sponsors of the Pelly and Packwood-Magnuson Amendments to the effect that Congress meant the Secretary to certify nations that "fl[ou]t" or "ignore" or "flagrantly violate" international quotas. (App. A22 & n.13.) But Japan could not violate the quotas because, by its objections, the quotas were not applicable to it. Neither did it flout or ignore them. It took them seriously into account and has now, in performance of its agreement with the United States, withdrawn irrevocably one of its objections and committed itself to the withdrawal of the other. It is most doubtful that any of the sponsors whose statements were relied on below had in mind any such behavior when they were describing the conduct that the Secretary was to certify as "diminish[ing] the effectiveness" of the ICRW.

Beyond that, however, the statute should not be construed to reach Japan's conduct because to do so results in a construction that is inconsistent with rights secured by a treaty to which the United States is a party. A century ago this Court said that "the court ought, if possible, to adopt the construction [of a statute] which recognized and saved rights secured by the treaty." *Chew Heong* v. *United States*, 112 U.S. 536, 549 (1884). Japan has a right, secured by the very treaty with which we are concerned, to exempt itself from treaty quotas. A construction of the Pelly and Packwood-Magnuson Amendments that requires the imposition of sanction on Japan for acting inconsistently with quotas from which it thus exempted itself is not a construction that saves and recognizes rights secured by the treaty. It is destructive of such rights.

The court below said that "[t]here is no prohibition in the Convention against member nations acting unilaterally to force an objecting member . . . to comply with the Convention's regulations, even when those regulations are not binding on the member." (App. A5 n.1.) Of course the Convention does not say that in so many words. This Court, however, has consistently held that treaties should be interpreted in a spirit of "*uberrima fides*," that is, with the most scrupulous good faith. *Tucker* v. *Alexandroff*, 183 U.S. 424, 437 (1902). *Accord Jordan* v. *Tashiro*, 278 U.S. 123, 127 (1928). It is not consistent with the utmost good faith to agree with a treaty partner that he may, so far as the treaty is concerned, engage in certain conduct and then undertake to punish him for precisely that conduct. Congress of course may abrogate a prior existing treaty agreement, but if it is to do so, it must do so

expressly. *Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, 104 S. Ct. 1776, 1783 (1984). Neither the Pelly Amendment nor the Packwood-Magnuson Amendment provides expressly for any such abrogation.

D. The Court of Appeals Construction of the Statutes Results in an Impermissible Delegation of Decisionmaking Power.

Under the construction adopted below of the Pelly and Packwood-Magnuson provisions, "discretion is vested in the international body rather than in the member nations." (App. A35.) Thus, according to Judge Wright, whenever the IWC exercises its discretion and prescribes a zero quota or a moratorium, the Secretary of Commerce, acting under a statute that provides "enforcement leverage" for the IWC (App. A4), has no discretion. He must certify any nation once he has determined that nationals of that country have taken a single whale. Upon such certification the Secretary of State must automatically impose the severe Packwood-Magnuson sanction. So construed, the Pelly and Packwood-Magnuson provisions amount to an unconstitutional delegation of sovereign power to an international entity.

Congress has apparently never attempted such a delegation of power to an international organization as the opinion below ascribes to it in this case. Consequently, there are no decisions squarely on point. This Court has recognized, however, that "[t]he powers of Government are delegated in trust to the United States, and are incapable of transfer to any other parties. They cannot be abandoned or surrendered." *The*

Chinese Exclusion Case, 130 U.S. 581, 609 (1889).

Moreover, if Congress may not constitutionally delegate legislative power to executive officials without adequately defining how the power is to be exercised, *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935); *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935), the delegation of power to an international body, like delegation to private persons, *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 310-12 (1936), is unconstitutional.

Just recently, an opinion announcing the judgment of this Court cautioned against statutory interpretations that "would make such a sweeping delegation of legislative power that it might be unconstitutional under the Court's reasoning in [*Schechter* and *Panama Refining*]. A construction of the statute that avoids this kind of open-ended grant should certainly be favored." *Industrial Union Department* v. *American Petroleum Institute*, 448 U.S. 607, 646 (1980) (plurality opinion). *See also id.* at 672-76 (Rehnquist, J., concurring).

II. THE QUESTION OF JUSTICIABILITY AND EQUITABLE DISCRETION

The majority opinion below scarcely took account of the gravity of the foreign affairs context in which it acted to direct the conduct of Executive Branch officials. The court did note that it was "urged that deference to the Executive is particularly apt and intrusion by the judiciary particularly inapt in the foreign affairs context." (App. A37.) By way of answer, it merely cited, first, Congress' power to regulate foreign commerce

and, second, *Marbury* v. *Madison*, 1 Cranch 137 (1803), for the proposition that "the judiciary's role is to declare what the law is when Congress has acted." (App. A37-38.) It gave no consideration to whether this is such a case as calls for judges to declare what the law is or, if it is, whether it was appropriate even so for the judges to enter orders telling Executive Branch officials what they must do, to the extent of acting in breach of their own solemn international undertakings. This Court should consider the propriety of a court's hearing a case that involves such delicate questions of international relations and of issuing mandatory equitable relief that has such consequences.

A. Courts Should Not Entangle Themselves in Delicate Issues of Foreign Relations.

The dissenting judge below, with whose views four circuit judges expressed their substantial agreement, thought it open to serious question whether this case presents a justiciable issue. Judge Oberdorfer cited and quoted from opinions of this Court, including the Court's warning in *Baker* v. *Carr*, 369 U.S. 186, 217 (1962), about "embarrassment from multifarious pronouncements by various departments on one question." This Court has declared that "the President alone has the power to speak or listen as a representative of the nation." *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936). Here, the President's subordinates have spoken by giving their word to Japan in exchange for its concessions on the taking of whales. Nevertheless, the Judicial Branch has now ordered that the Secretary dishonor the nation's word.

It was that word "upon which Japan relied in withdrawing its objection to the 1981 quota" (App. A43) and in allowing the members of the petitioner JWA to conduct whaling operations during the 1984-85 season, the operations for which the Secretary must now certify Japan and thus subject it and its fishermen to severe sanction. There is a serious question whether any United States court should involve itself in a case that can eventuate in the issuance of such an order.

B. In the Exercise of Equitable Discretion the Judiciary Should Not Compel the Executive to Dishonor an Executive Agreement.

Even if such a case should be thought technically justiciable, there are equitable considerations that argue against the issuance of the mandatory order in this case. In disregard of this Court's controlling decisions, the court below took no account of these considerations . The order, whether or not technically termed mandamus, is in the nature of mandamus, compelling an Executive Branch official affirmatively to take certain action. It is doubtful that the case satisfies the traditional mandamus requirement that the judicially enforceable duty be plain and ministerial. The statutes on their face either plainly confer on the Secretary of Commerce the discretion he exercised or, at worst, are uncertain. The court's finding that the Secretary has a ministerial duty was based not on the words of the statutes but on debates recorded in the Congressional Record.

Even if traditional mandamus criteria did not require the courts below to stay their hands, this

was a case in which equities had to be weighed before relief was granted, for "an injunction is an equitable remedy. It 'is not a remedy which issues as of course,' . . ." *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 311 (1982) (quoting *Harrisonville* v. *W.S. Dickey Clay Manufacturing Co.*, 289 U.S. 334, 337-38 (1933)). The issuance of an injunction is in the sound discretion of the court. "[A] federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law." 456 U.S. at 313. *See also Hecht Co.* v. *Bowles*, 321 U.S. 321 (1944). And "[i]n exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Id.* at 312. The necessity to weigh the equities is not different if the case is regarded as one of mandamus. "[M]andamus is itself governed by equitable considerations and is to be granted only in the exercise of sound discretion." *Whitehouse* v. *Illinois Central Railroad*, 349 U.S. 366, 373 (1955).

Here the equitable considerations arguing against an injunction or mandamus are extraordinarily strong. As Judge Oberdorfer said, they "weigh heavily in favor of the Secretary." (App. A48.) "The ultimate equity," said Judge Oberdorfer, "is that the United States, speaking through the Secretary of Commerce, has given its word in apparent reliance on the language of an Act of Congress," and "Japan has made a reciprocal promise in reliance on the same language and the Secretary's interpretation of it." (*Id.*) The courts below disregarded that "ultimate equity" when they misused the Chancellor's power to compel the United States to dishonor its word and to do so at the expense of a friendly nation that relied on its

citizens. Small wonder that four circuit judges expressed their substantial agreement with Judge Oberdorfer's dissent from that action. This Court alone can now rectify the wrong that has been done.

CONCLUSION

This Court should review the unprecedented foray of the courts below into foreign affairs. The decision below threatens not only to disrupt United States-Japanese relations, but also to cast in doubt the integrity of the Government of the United States in the world community. The petition for a writ of certiorari should be granted.

Respectfully submitted,

of counsel
WILLIAM H. ALLEN
Covington & Burling
1201 Pa. Ave., NW
Washington, DC
20044

STEVEN R. PERLES
SCOTT C. WHITNEY
1320 19th St., NW
Washington, DC
20036
(202) 833-2170

Attorneys for Petitioners

APPENDICES

APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-5251

AMERICAN CETACEAN SOCIETY, *et al.*

v.

MALCOLM BALDRIGE, Secretary of Commerce, *et al.*, APPELLANTS

JAPAN WHALING ASSOCIATION, *et al.*

No. 85-5252

AMERICAN CETACEAN SOCIETY, *et al.*

v.

MALCOLM BALDRIGE, Secretary of Commerce, *et al.*

JAPAN WHALING ASSOCIATION, *et al.*, APPELLANTS

Appeals from the United States District Court
for the District of Columbia
(D.C. Civil Action No. 84-3414)

Argued May 16, 1985

Decided August 6, 1985

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Dianne H. Kelly, Attorney, Department of Justice, with whom *F. Henry Habicht, II*, Assistant Attorney General, *Donald A. Carr* and *Martin W. Matzen*, Attorneys, Department of Justice, and *Robert J. McManus*, Attorney, Department of Commerce, were on the brief, for the federal appellants.

Scott C. Whitney, with whom *Steven R. Perles* was on the brief, for appellants Japan Fisheries Association and Japan Whaling Association.

James A. Beat, with whom *William D. Rogers* and *John F. Libby* were on the brief, for appellees.

Before WRIGHT and TAMM, *Circuit Judges*, and OBERDORFER,* *District Judge*.

Opinion for the court filed by *Circuit Judge* WRIGHT.

Dissenting opinion filed by *District Judge* OBERDORFER.

WRIGHT, *Circuit Judge*: In this case we review a decision of the District Court that the Secretary of Commerce must, under the Pelly and Packwood-Magnuson Amendments, *see* 22 U.S.C. § 1978 (1982); 16 U.S.C. § 1821(e)(2) (1982), certify Japan as "diminish[ing] the effectiveness" of the International Convention for the Regulation of Whaling (ICRW), *entered into force* November 10, 1948, 62 STAT. 1716, T.I.A.S. 1849, *reproduced* in Joint Appendix (JA) at 47-57, because Japanese nationals are undisputedly harvesting whales in excess of the harvest quotas promulgated under that Convention.

We agree with the District Court's ultimate conclusion that certification in this case is mandatory, though we reach it for slightly different reasons. Thus we hold that, although in some situations the Secretary has discretion whether to certify, the Secretary is required by law to

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* Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a).

certify a foreign country whose nationals are harvesting whales in excess of ICRW quotas. Consequently, we affirm the judgment of the District Court.

I. Background

A. *The International Convention for the Regulation of Whaling*

The ICRW was formed in 1946 to regulate whaling by "establish[ing] a system of international regulation for the whale fisheries to ensure proper and effective conservation and development of whale stocks." Preamble, JA 48. Toward this end, a Schedule of specific requirements and prohibitions regarding whaling practices was promulgated; this Schedule was adopted as part of the Convention. *See* Article I, JA 48; Schedule, JA 52-56.

In addition, the signatory nations agreed to establish an International Whaling Commission (IWC). *See* Article III, JA 48. The ICRW authorized the IWC to study whales, whale stocks, and whaling practices. *See* Article IV, JA 49. The IWC was also authorized to amend the ICRW Schedule

> by adopting regulations with respect to the conservation and utilization of whale resources, fixing (a) protected and unprotected species; (b) open and closed seasons; (c) open and closed waters, including the designation of sanctuary areas; (d) size limits for each species; (e) time, methods, and intensity of whaling (including the maximum catch of whales to be taken in any one season); (f) types and specifications of gear and apparatus and appliances which may be used; (g) methods of measurement; and (h) catch returns and other statistical and biological records.

Article V, JA 49-50.

With respect to such amendments, the ICRW provided for an objection procedure. Under this procedure, any of the member nations may file an objection to a Schedule

amendment within 90 days of being notified of the amendment. If such an objection is filed in a timely manner, the objecting nation is not bound by the amendment (although the non-objecting nations are bound). Once an objection is withdrawn, however, it cannot be refiled. *See* Article V, JA 50.

B. *U.S. Enforcement Legislation*

Under the ICRW, the IWC itself has no enforcement powers against nonmembers or against members who, by objecting, choose not to be bound by a given IWC determination. This lack of enforcement ability is typical of international fishery and wildlife conservation programs. To provide enforcement leverage for this and other such programs, Congress in 1971 enacted the Pelly Amendment. *See* 22 U.S.C. § 1978. Although this Amendment focused on the depletion of North Atlantic salmon stocks by Denmark in excess of the quotas for fishing those stocks set under the International Convention for the Northwest Atlantic Fisheries (ICNAF), it clearly covered whaling as well. *See* H.R. Rep. No. 92-468, 92d Cong., 1st Sess. 4-6 (1971) (hereinafter Pelly House Report); 117 Cong. Rec. 34752 (1971) (statement of Rep. Pelly).

The Pelly Amendment provides that "[w]hen the Secretary of Commerce determines that nationals of a foreign country, directly or indirectly, are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program, the Secretary of Commerce shall certify such fact to the President." 22 U.S.C. § 1978(a)(1). The term "international fishery conservation program" is defined as "any ban, restriction, regulation, or other measure in effect pursuant to a multilateral agreement which is in force with respect to the United States, the purpose of which is to conserve or protect the living resources of the sea." Id. § 1978(h)(3). The phrase "diminish the effectiveness" is not defined in the statute.

The legislative history of this statutory provision clearly indicates that it authorizes certification of activities of nonmembers or members acting under a valid objection to an IWC Schedule amendment. *See* Pelly House Report at 5, 8-10 (explaining that Denmark, although it had objected to an ICNAF ban and was thus "free to ignore the ban" under the convention, would be covered under the Pelly Amendment).[1] The Amendment further provides that

> [u]pon receipt of any certification made under [22 U.S.C. § 1978(a)(1)], the President may direct the Secretary of the Treasury to prohibit the bringing or the importation into the United States of fish products * * * from the offending country for such duration as the President determines appropriate and to the extent that such prohibition is sanctioned by the General Agreement on Tariffs and Trade.

22 U.S.C. § 1978(a)(4). Thus the President is authorized to place a foreign country in the position of having all its fish product exports to the United States prohibited for as long as the President deems necessary if the country's nationals "diminish the effectiveness" of an international fishery conservation program—whether or not the fishing is legal under the terms of the Convention by virtue of the foreign country having objected to the relevant provision or being a nonmember nation.[2]

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[1] Intervenor-appellants Japan Fisheries Association and Japan Whaling Association argue that certification and the imposition of sanctions pursuant to such certification are violations of international law when applied to a validly objecting member insofar as the Convention requirements are not effective with respect to such a member. We disagree. There is no prohibition in the Convention against member nations acting unilaterally to force an objecting member (or nonmember) to comply with the Convention's regulations, even where those regulations are not binding on the member (or nonmember) under the terms of the Convention itself.

[2] The idea behind this provision was that a foreign country in this position will choose the less damaging economic alter-

In addition, the President is required to notify Congress of any actons taken pursuant to certification within 60 days of that certification; if the President does not impose the sanctions authorized, he must also give reasons to Congress for his failure to do so. *See* 22 U.S.C. § 1978(b).[3]

After passage of the Pelly Amendment, several certifications occurred, although no sanctions were ever imposed by the President against the offending countries. Instead, the certifications were used to extract conservation agreements from the offending nations. Further, the

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native, which will usually be giving up the proscribed fishing rather than the U.S. fish products export market. As the House reported noted,

> In the case of Atlantic Salmon, Danish exports to the United States totalled 54,365 pounds in 1970 worth $63,844.00. Imports of all Danish fish products totalled 31,656,00 lbs. valued at $10,543,298. The impact of lossing [*sic*] a 10 million dollar market as opposed to a 63 thousand dollar market is obvious.

House Pelly Report at 7.

[3] In 1978, in response to the signing of the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"), *opened for signature* March 3, 1973, [1976] 27 U.S.T. 1087, T.I.A.S. No. 8249, Congress amended the Pelly Amendment by adding a new certification section:

> When the Secretary of Commerce or the Secretary of the Interior finds that nationals of a foreign country, directly or indirectly, are engaging in trade or taking which diminishes the effectiveness of any international program for endangered or threatened species, the Secretary making such finding shall certify such fact to the President.

22 U.S.C. § 1978(a)(2). Further, § 1978(a)(4) was amended to authorize the President to "prohibit the bringing or the importation into the United States of * * * wildlife products * * * from the offending country" in the case of such certification. The congressional notification provisions also were applied to these situations. *See* 22 U.S.C. § 1978(b).

certifications that were made were not accomplished in a notably expeditious fashion. *See, e.g.*, 125 Cong. Rec. 22084 (1979) (statement of Rep. Oberstar). In response to the non-imposition of the Pelly Amendment's discretionary sanctions and to the perceived dilatory certification decisionmaking on the part of the Secretary of Commerce, Congress in 1979 passed the Packwood-Magnuson Amendment. *See* 16 U.S.C. § 1821(e)(2).

The Packwood-Magnuson Amendment provides that if the Secretary of Commerce certifies that a country is diminishing the effectiveness of the IRCW (this provision applies only to the ICRW), the Secretary of State *must* impose a sanction against the offending country.[4]

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[4] The Packwood-Magnuson Amendment provisions regarding imposition of the sanction are:

> (B) If the Secretary issues a certification with respect to any foreign country, then each [U.S. fishing allocation] that—
>
> (i) is in effect for that foreign country on the date of issuance; or
>
> (ii) is not in effect on such date but would, without regard to this paragraph, be made to the foreign country within the remedial period [the one year following certification];
>
> shall be reduced by the Secretary of State, in consultation with the Secretary, by not less than 50 percent.
>
> (C) The following apply for purposes of administering subparagraph (B) with respect to any foreign country:
>
> (i) If on the date of certification, the foreign country has harvested a portion, but not all, of the quantity of fish specified under any allocation, the reduction under subparagraph (B) for that allocation shall be applied with respect to the quantity not harvested as of such date.
>
> (ii) If the Secretary notified the Secretary of State that it is not likely that the certification of the foreign country will be terminated under section 1978(d) of title 22 before the close of the period for

The sanction is an immediate reduction, by not less than 50 percent, of any allocation for fishing in United States territorial waters that is in effect for that country on the date of certification or that would otherwise be made within the year following certification. 16 U.S.C. § 1821 (e) (2) (B).[5] If the certification is terminated within

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> which an allocation is applicable or before the close of the remedial period (whichever close first occurs) the Secretary of State, in consultation with the Secretary, shall reallocate any portion of any reduction made under subparagraph (B) among one or more foreign countries for which no certification is in effect.
>
> (iii) If the certification is terminated under such section 1978(d) of title 22 during the remedial period, the Secretary of State shall return to the foreign country that portion of any allocation reduced under subparagraph (B) that was not reallocated under clause (ii); unless the harvesting of the fish covered by the allocation is otherwise prohibited under this chapter.
>
> (iv) The Secretary may refund or credit, by reason of reduction of any allocation under this paragraph, any fee paid [by the foreign country for its fishing permits].
>
> (D) If the certification of a foreign country is not terminated under section 1978(d) of title 22 before the close of the last day of the remedial period, the Secretary of State—
>
> (i) with respect to any allocation made to that country and in effect (as reduced under subparagraph (B)) on such last day, shall rescind, effective on and after the day such last day, any unharvested portion of such allocation; and
>
> (ii) may not thereafter make any allocation to that country * * * until the certification is terminated.

16 U.S.C. § 1821(e) (2).

[5] As originally introduced, the bill would have applied to all countries certified under the Pelly Amendment with re-

one year by virtue of a determination by the Secretary of Commerce that the justification for the certification has ceased, the prior allocation must be reinstated. Otherwise, the reduced allocation remains in effect until such time as the certification is terminated. The Packwood-Magnuson Amendment, therefore, did not alter the Pelly Amendment's provision regarding certification of foreign countries; it simply provided for a mandatory sanction where certification occurs in the whaling context.[6]

The Packwood-Magnuson Amendment also included two provisions amending the Pelly Amendment. The first one requires prompt action by the Secretary with respect to certification decisions. This provision states that

> the Secretary of Commerce * * * shall—
>
> (A) periodically monitor the activities of foreign nationals that may affect the international programs referred to in paragraphs (1) and (2);

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spect to "living marine resources" and would have required 100% prohibition of U.S. fishing allocations. *See* S. Rep. No. 96-72, 96th Cong., 1st Sess. 6 (1979). *See also* 125 Cong. Rec. 21743 (1979) (statement of Sen. Packwood); *id.* at 22082-22083 (statement of Rep. Murphy). (Under the final bill, a 50% reduction is required; a greater reduction is possible at the discretion of the Secretary of State.) The original bill, however, would have cut the allocation only as of the expiration of the country's current fishing permit. *See id.* at 22083 (statement of Rep. Murphy).

[6] It also explicitly preserved the option of imposing the Pelly Amendment sanction in addition to the Packwood-Magnuson sanction. *See* 16 U.S.C. § 1821(e)(2)(A)(i). *See also* 125 Cong. Rec. 21743 (1979) (statement of Sen. Magnuson) "This amendment is a significant addition to the sanctions presently available under the Pelly Amendment * * *."); *id.* at 22084 (statement of Rep. Oberstar) ("The legislation before us does not deprive the President of the authority to invoke the discretionary penalty; it adds an additional penalty that is automatic.").

> (B) promptly investigate any activity by foreign nationals that, in the opinion of the Secretary, may be cause for certification under paragraphs (1) or (2); and
>
> (C) promptly conclude; and reach a decision with respect to; any investigation commenced under subparagraph (B).

22 U.S.C. § 1978(a)(3). The second amending provision provides for periodic review by the Secretary of the validity of his certification decision and for its termination when it is no longer necessary. *See id.* § 1978(d). The overall thrust of the Packwood-Magnuson Amendment, therefore, was to narrow Executive Branch discretion allowed by the Pelly Amendment.

C. *History of This Dispute*

In 1981 the IWC voted to provide a zero quota for North Pacific sperm whales. Specifically, the IWC members agreed that no sperm whales could be taken unless the IWC established a specific quota for a given year. Japan filed a timely objection to this quota. In 1982 Japan succeeded in obtaining an IWC revision of this zero quota for the following two harvest seasons (and for those seasons only). Also in 1982, however, the IWC voted to implement a five-year moratorium on all whaling beginning in 1986. The purpose of this moratorium was to allow regeneration of depleted whale populations and to afford scientists an opportunity to gather additional information on the vitality and security of whale populations. The decision provides for automatic reconsideration of the moratorium in 1990. Japan, the Soviet Union, and Norway filed timely objections to the moratorium.

Pursuant to Japan's formal objection to the sperm whale quota, Japanese whalers have continued to harvest whales in excess of the IWC (zero quota) limits. *See American Cetacean Society v. Baldridge* [*sic*], 604

F.Supp. 1398, 1404, 1409 (D. D.C. 1985). In response to these activities Greenpeace and other conservation organizations filed this suit on November 8, 1984, requesting that the District Court order the Secretary of Commerce to certify Japan under the Pelly and Packwood-Magnuson Amendments. They contended that such certification is mandatory and nondiscretionary where harvesting that is clearly in excess of the IWC quotas occurs under the auspices of a foreign government.

Also in November 1984 the Secretary of State and the Secretary of Commerce entered into negotiations with Japan regarding its whaling activities. On November 13, 1984 an executive agreement was reached in an exchange of letters between the United States and Japan. *See* JA 78-84. In these letters the United States agreed not to certify Japan under the Pelly and Packwood-Magnuson Amendments in exchange for Japan's agreement to cease all whaling in 1988 (two years after the moratorium goes into effect) and to take no more than 400 sperm whales in each of the 1984 and 1985 seasons, no more than 200 sperm whales in each of the 1986 and 1987 seasons, and an "acceptable" number of Bryde's and minke whales in the 1986 and 1987 seasons. *See* JA 81-82. This agreement, therefore, allows continued Japanese violation of the quotas until 1988 with no imposition of sanctions by the United States. Japan in turn agreed to withdraw its IWC objections: to the sperm whale quota by December 13, 1984, to become effective in 1988 (which it did, *see* JA 106), and to the moratorium by April 1, 1985, also to become effective in 1988.

On March 5, 1985, however, Judge Richey issued an order and opinion granting the plaintiffs the relief they requested and ordering the Secretary of Commerce to certify Japan. *See* 604 F.Supp. at 1411. The government immediately appealed to this court, which granted a stay

of the order pending appeal.[7] In response to the District Court's decision, Japan has indicated that it would not withdraw its general objection to the moratorium on April 1, 1985, as agreed. It has also indicated, however, that it would withdraw that objection within five days of a decision by this court reversing the District Court. *See* brief for federal appellants at 9-10.

II. Legal Principles and Standard of Review

The District Court determined that there were no genuine issues of material fact and that the plaintiffs were entitled to judgment as a matter of law. *See* 604 F.Supp. at 1404-1408.[8] The District Court further concluded that issuance of a writ of mandamus was appropriate in the circumstances of this case. *See id.* at 1410-1411.[9]

The government does not contend on this appeal that a genuine issue of material fact exists. Rather, it argues that the District Court's view of the law was erroneous and that issuance of the writ of mandamus was unsupported by the substantive statute. Specifically, the government interprets the statute as affording it broad discretion in deciding whether to certify Japan in the circumstances of this case. And the government contends that

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[7] The District Court had previously denied such a stay. *See American Cetacean Society v. Baldridge*, 604 F.Supp. 1411 (1985).

[8] *See* Fed. R. Civ. P. 56(c) ("[Summary judgment] shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.").

[9] *See* 28 U.S.C. § 1361 (1982) ("The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.").

its interpretation of the statutory language is entitled to deference because Congress did not address the specific question at issue here and thus implicitly delegated the task of filling the statutory gap to those charged with implementing the statute (here the Secretary of Commerce). The government further argues that because (according to its interpretation of the statute) it has discretion with respect to the action sought by the plaintiffs the remedy of mandamus is precluded. The government goes on to argue that it exercised its discretion in a reasonable manner and that its decision must therefore be upheld. These arguments make clear that we review here a purely legal determination on the part of the District Court. Consequently, we perform that review *de novo*.

A. *Interpretation of the Statute*

The fundamental question here is one of statutory interpretation. As this court has noted previously, our first task in approaching such a question is to determine whether Congress had an intent with respect to the relevant issue. " 'If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.' " *American Methyl Corp. v. EPA*, 749 F.2d 826, 833-834 (D.C. Cir. 1984) (*quoting Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, —— U.S. ——, —— n.9, 104 S.Ct. 2778, 2782 n.9 (1984)). *See also Chemical Manufacturers Ass'n v. Natural Resources Defense Council, Inc.*, —— U.S. ——, ——, 105 S.Ct. 1102, 1108 (1985). In this step, "we are not required to grant any particular deference to the agency's parsing of statutory language or its interpretation of legislative history." *Rettig v. Pension Benefit Guaranty Corp.*, 744 F.2d 133, 141 (D.C. Cir. 1984). *See also State of Montana v. Clark*, 749 F.2d 740, 745 (D.C. Cir. 1984).

If we determine that Congress had no intent regarding the issue in question, then we must consider whether

Congress delegated to the agency the task of filling the statutory gaps or of interpreting statutory ambiguities. If Congress has explicitly delegated to the agency the responsibility of "explicat[ing] the ambiguous language or fill[ing] the statutory void," *State of Montana, supra*, 749 F.2d at 745, then we must "affirm the agency's construction unless [it is] arbitrary, capricious, or manifestly contrary to law." *Id. See also* 5 U.S.C. § 706(2)(A) (1982). If Congress has implicitly delegated that responsibility to the agency, "*Chevron* commands that the court affirm an agency's interpretation of a statute it is entrusted to administer provided that it is 'reasonable.'" *State of Montana, supra*, 749 F.2d at 745. Thus, where Congress has delegated—explicitly or implicitly—certain interpretive power to the agency, we will defer to the agency's interpretation if it falls within the boundaries of that delegation. We emphasize again, however, that this analysis is proper only if Congress itself had no intent regarding the question at issue.

B. *Propriety of Mandamus*

It is well established that mandamus is proper only if "(1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to the plaintiff." *Council of and for the Blind of Delaware County Valley v. Regan*, 709 F.2d 1521, 1533 (D.C. Cir. 1983) (*en banc*). Mandamus will issue "'only where the duty to be performed is ministerial and the obligation to act peremptory, and clearly defined. The law must not only authorize the demanded action, but require it; the duty must be clear and undisputable.'" *13th Regional Corp. v. U.S. Dep't of Interior*, 654 F.2d 758, 760 (D.C. Cir. 1980) (*quoting United States ex rel. McLennan v. Wilbur*, 283 U.S. 414, 420 (1931)).[10]

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[10] Even where mandamus is legally appropriate, a District Court may exercise its equitable discretion and deny the writ if issuance is inappropriate for other reasons. *See, e.g., 13th*

As this court has noted previously, however, "[t]he requirement that a duty be 'clearly defined' to warrant issuance of a writ does not rule out mandamus actions in situations where the interpretation of the controlling statute is in doubt. * * * As long as the statute, once interpreted, creates a peremptory obligation for the officer to act, a mandamus action will lie." *13th Regional Corp., supra*, 654 F.2d at 760. The question, therefore, is one of congressional intent: "If, after studying the statute and its legislative history, the court determines that the defendant official has failed to discharge a duty which Congress intended him to perform, the court should compel performance, thus effectuating the congressional purpose." *Estate of Smith v. Heckler*, 747 F.2d 583, 591 (10th Cir. 1984) (*citing Carpet, Linoleum & Resilient Tile Layers, Local Union No. 419 v. Broum*, 656 F.2d 564, 566 (10th Cir. 1981)). *See also Work v. Rives*, 267 U.S. 175, 177 (1925).

Our approach in addressing a request for a writ of mandamus is thus entirely consistent with the statutory interpretation approach set forth in *Chevron, supra*: As with any statutory question, the first step is to determine the intent of Congress. If Congress had an intent with respect to the question at issue and if that intent was to create a mandatory, nondiscretionary duty on the part of the official(s) charged with administering the statute, then mandamus is appropriate (if no other remedy is adequate). Alternatively, even if Congress had an intent, if it did not intend to create a mandatory duty, mandamus is not appropriate. So too, if Congress had no particular intent but rather intended to delegate the interpretive function to the agency, mandamus is precluded.

Regional Corp., 654 F.2d 758, 760, 762-763 (D.C. Cir. 1980) (delay of four years in seeking writ reasonable basis for denying it). *See also Cartier v. Secretary of State*, 506 F.2d 191, 199 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 947 (1975).

The demarcations between these classes of cases will not always be self-evident, however. For example, Congress may delegate some interpretive authority to an agency and yet simultaneously have a specific intent with respect to some situations that might normally be thought to fall within the boundaries of the delegated discretion. "In other words, even in an area generally left to agency discretion, there may well exist statutory or regulatory standards delimiting the scope or manner in which such discretion can be exercised. In these situations, mandamus will lie when the standards have been ignored or violated." *Davis Associates, Inc. v. Secretary, Dep't of HUD*, 498 F.2d 385, 389 n.5 (1st Cir. 1974). *See also Estate of Smith, supra*, 747 F.2d at 591; *Carpet Layers Local 419, supra*, 656 F.2d at 566; *Grasso v. Norton*, 520 F.2d 11, 26-27 (3d Cir. 1975); *De La Fuente v. Stokely-Van Camp, Inc.*, 514 F. Supp. 68, 82 (C.D. Ill. 1981); *Corrugated Container Corp. v. Community Services Administration*, 429 F. Supp. 142, 151-152 (W.D. Va. 1977). Consequently, we must be careful to ascertain as precisely as possible the exact contours of congressional intent and of congressional delegation. With this cautionary thought in mind, we proceed to the statutory interpretation issue presented in this case.

III. Discussion

The precise question in this case is whether the statutory requirement that the Secretary of Commerce certify a foreign country when he determines that nationals of the country are acting so as to diminish the effectiveness of the ICRW imposes on the Secretary a nondiscretionary duty to certify when he determines that the nationals of a foreign country are harvesting whales in excess of an IWC quota.

A. *Identification of the Governing Statutory Provision*

As noted above, there are two legislative enactments at the center of this controversy. In determining congres-

sional intent as to the key statutory phrase, it is necessary first to ascertain which statute containing that phrase is the relevant statute in the situation at hand. On this issue, the parties' positions are quite unclear. For example, all of the parties refer to the legislative history of both the Pelly and Packwood-Magnuson Amendments without indicating which statutory provision is the critical one.

Although it is clear that certification in this case would result in imposition of the Packwood-Magnuson sanction, we are concerned here with the statute governing the certification itself. The Pelly Amendment provides for investigation of suspected actions that might qualify for certification and for certification of actions that "diminish the effectiveness" of an international fishery conservation program. It then authorizes the President, at his discretion, to impose certain sanctions on the certified country. The Packwood-Magnuson Amendment, on the other hand, provides for mandatory imposition of other sanctions "[i]f the Secretary issues a certification with respect to any foreign country * * *." 16 U.S.C. § 1821(e)(2)(B). Such certification, for purposes of the Packwood-Magnuson Amendment, includes only a certification with respect to the ICRW. *Id.* § 1821(e)(2)(A)(i).

These provisions indicate that certification of a country for diminishing the effectiveness of the ICRW in fact occurs under the Pelly Amendment; only after certification occurs do the Packwood-Magnuson Amendment mandatory sanction provisions kick in. This interpretation is consistent with the legislative history of the Packwood-Magnuson Amendment, which indicates that the purpose of that Amendment was simply to create a new sanction for ICRW certifications—not to alter the certification process. *See* S. Rep. No. 96-72, 96th Cong., 1st Sess. 6 (1979); 125 Cong. Rec. 22082 (1979) (statement of Rep. Murphy).

One provision of the Packwood-Magnuson Amendment, however, seems at first reading to cast some doubt on this theory. That provision states: "A certification under [the Packwood-Magnuson Amendment] shall also be deemed a certification for the purposes of section 1978(a) of title 22 [the Pelly Amendment]." 16 U.S.C. § 1821(e)(2)(A)(i). Although this language could be interpreted to mean that an ICRW-related certification in fact occurs under the Packwood-Magnuson Amendment, we conclude that it is better read as meaning that a certification made under the Pelly Amendment but qualifying under the Packwood-Magnuson Amendment (that is, one relating to the ICRW) is also a certification for purposes of the discretionary Pelly Amendment sanctions authorized by 22 U.S.C. § 1978(b). *See* note 6 *supra*. That is, a country that is certified for ICRW-related actions is automatically sanctioned under Packwood-Magnuson and also may, at the President's discretion, be sanctioned under the Pelly Amendment itself. This interpretation is supported by the fact that the Packwood-Magnuson Amendment refers to the possibility of the Secretary terminating certification *under 22 U.S.C. § 1978(d)*. *See* 16 U.S.C. §§ 1821(e)(2)(C)(ii) & (D). Section 1978(d), however, applies specifically to termination of certifications made under the Pelly Amendment.[11]

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[11] 22 U.S.C. § 1978(d) provides:

> After making a certification to the President under subsection (a) of this section, the Secretary of Commerce or the Secretary of the Interior, as the case may be, shall periodically review the activities of the nationals of the offending country to determine if the reasons for which the certification was made no longer prevail. Upon determining that such reasons no longer prevail, the Secretary concerned shall terminate the certification and publish notice thereof, together with a statement of the facts on which such determination is based, in the Federal Register.

In sum, therefore, although the certification language appears in both the Pelly and the Packwood-Magnuson Amendments, we are concerned here with its meaning in the Pelly Amendment, for ICRW certifications are actually made under that Amendment. Thus we look first to the language and legislative history of the Pelly Amendment itself to determine congressional intent as to the meaning of this phrase. Legislative history subsequent to the Pelly Amendment is relevant only for the limited purpose of determining whether Congress later expressed a different intent, which would then govern this case.

B. *Interpretation of the Governing Statutory Provision*

The relevant statutory language provides:

> When the Secretary of Commerce determines that nationals of a foreign country, directly or indirectly, are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program, the Secretary of Commerce shall certify such fact to the President.

22 U.S.C. § 1978(a)(1). Under this provision there are two steps in the certification process. First, the Secretary must determine whether actions of foreign nationals are "diminish[ing] the effectiveness" of an international fishery conservation program. Second, if he so determines he shall certify that fact to the President. We will address each statutory step separately.

1. *Does whaling in violation of an IWC quota require that the Secretary conclude that the foreign nation is "diminishing the effectiveness" of the ICRW?*

a. *Statutory language.* The critical statutory phrase, "diminish the effectiveness," is not defined in the statute. The language, furthermore, does not indicate the boundaries of administrative discretion intended by Congress to apply. To ascertain congressional intent, therefore, we turn to the relevant legislative history.

b. *Legislative history of the Pelly Amendment.* The House and Senate committee reports and statements on the floor of the Congress give clear indications of congressional intent with respect to the critical language. Specifically, they indicate quite plainly that fishing in excess of internationally set quotas was considered an automatic trigger of certification.

The Senate Report, for example, states that the purpose of the Amendment was

> to amend the Fisherman's Protective Act * * * to prohibit the importation of fishery products from nations that do not conduct their fishing operations in a manner that is *consistent with international conservation programs.* It would accomplish this by providing that *whenever the Secretary of Commerce determines that a country's nationals are fishing in such a manner, he must certify such fact to the President.* * * *

S. Rep. No. 92-582, 92d Cong., 1st Sess. 2 (1971) (emphasis added).[12] This statement makes plain that fishing that is inconsistent with internationally set quotas mandates certification. Since, as noted above, member countries that filed valid objections were intended to be covered by this Amendment, *see* Pelly House Report at 5, 8-10, the failure to act "consistent with" an international program must include fishing by even such members in excess of convention quotas. Consequently, this statement

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[12] There are actually two Senate Reports, both issued the same day, that are relevant to the Pelly Amendment. The first, S. Rep. No. 92-582, accompanied S.2191. S.2191, however, was amended in committee to the exact language of H.R. 3304, the bill that the Senate eventually passed as the Pelly Amendment. The second, S. Rep. No. 92-583, 92d Cong., 1st Sess. (1971), accompanied H.R. 3304. S. Rep. 92-582 contains substantive discussion of S.2191. S. Rep. 92-583 merely reported H.R. 3304 without recommendation or amendment. Since both bills were the same with respect to the provisions that concern us, we regard S. Rep. 92-582 as the relevant report.

makes abundantly clear that exceeding internationally set quotas was intended to automatically trigger certification.

This unambiguous passage finds generous support from other statements in the committee reports and in the floor debates on the bill. In all of these statements, the determination that a country was "violating," acting "inconsistent with," or failing to "abide by" was equated with the fact of certification.

For instance, both the Senate and House reports note that the provision requiring that the President notify Congress whenever certification occurred would "insure that the Congress is made aware of the failure of any foreign country to abide by an international fishery conservation program." Pelly House Report at 8; S. Rep. No. 92-582 at 6. These statements obviously contemplate that notification (and thus the certification that triggers it) would automatically occur any time a foreign country exceeded internationally set regulations.

In addition, Senator Stevens, the acting chairman of the reporting Senate Committee, clearly envisioned that a violation would trigger the President's power to impose sanctions. Whether application of sanctions was discretionary is not the issue at this point; the issue is whether Congress intended that violations of fishing agreements would automatically trigger that sanction-imposing power. Senator Stevens emphasized:

> I believe it is important to note that such importation prohibition as permitted by the act is not limited to the particular fish product taken *in violation of a particular fish conservation program.* For example, although a given country, I use Denmark as an example, violates an international fisheries conservation program, such as the International Convention for the Northwest Atlantic Fisheries—ICNAF, the President may prohibit the importation of all fish products from the offending country, not

> only salmon. This is important, because it multiplies the effect of a violation manifold. * * *

117 Cong. Rec. 47053 (1971) (emphasis added).

Neither Senator Stevens nor any other congressional speaker ever remotely suggested that which the government argues here—that Congress intended that there be some intermediate exercise of discretion between (1) the violation of an international fishing agreement and (2) the presidential power to impose sanctions. Rather, the power to impose sanctions was viewed as an immediate incident to recognition of the violation. *See also id.* at 34750 (statement of Rep. Dingell) ("the purpose of [the bill] * * * is to authorize the President of the United States to prohibit the importation into this country of fishery products from nations that do not conduct their fishing operations in a manner that is consistent with international fishery conservation programs").[13]

Indeed, the Executive Branch itself indicated this understanding that the power to impose sanctions was an automatic consequence of a fishing agreement violation. For example, the Commerce Department stated that "the existence of [the ICNAF ban on high seas fishing for Atlantic salmon] would * * * authorize the President to impose sanctions against countries which do not abide by that ban * * *." Pelly House Report at 10. Again, there was no hint of some intermediate exercise of discretion, as the government now contends. Thus the direct legislative history of the Pelly Amendment clearly indi-

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[13] Representative Pelly stated that the provision would extend to "flagrant violations" other than salmon fishing and that the provision would prevent American benefits (access to the American import market) from accruing to foreign countries that "flount [*sic*] international conservation measures." *See* 117 Cong. Rec. 34752 (1971). These statements do indicate that flagrant actions in excess of internationally set regulations would result in certification, but do not indicate that non-flagrant actions would not. Consequently, they are not directly relevant to the issue at hand.

cates that Congress intended that fishing in excess of internationally set conservation regulations constitute *per se* actions diminishing the effectiveness of an international program.

c. *Congressional use of the key phrase in a similar context.* As this court has noted, "[A]bsent evidence to the contrary, words or phrases taken from prior legislation will be given the same meaning, since there is hardly a basis for assuming that the lawmakers had anything else in mind." *United Shoe Workers of America v. Bedell*, 506 F.2d 174, 183 (D.C. Cir. 1974) (footnotes omitted). This admonition is important in this case because the crucial language was used by Congress in an earlier act dealing with a similar situation. In that context, Congress' intent was clearly that quota violations *per se* diminished the effectiveness of the international program.

In the attachments to the House Report on the Pelly Amendment are comments on the proposed Amendment from various Executive agencies. Among these is a letter from the Secretary of Commerce in which the Secretary observes, without elaboration, that the scheme set up by the Pelly Amendment is similar in language and approach to that used in the Tuna Convention Act of 1950 (as amended). 16 U.S.C. § 951 *et seq.* (1982). *See* Pelly House Report at 13.

Looking to the Tuna Act, we note that, in a provision added in 1962, Congress required the Secretary of Commerce to promulgate regulations prohibiting the importation of tuna while international tuna conservation recommendatons were in force whenever fishing was being conducted "in such manner or in such circumstances as would tend to diminish the effectiveness" of the international recommendations. *See* 16 U.S.C. § 955(c).[14]

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[14] 16 U.S.C. § 955(c) provides in relevant part:

> [U]pon the promulgation of any [domestic regulations implementing the recommendations of the Inter-American

The legislative history of the 1962 amendments, which added the relevant provisions to the Tuna Act, details what was meant by this language. In the Senate Report accompanying those amendments, the Commerce Committee incorporated into the body of the report a statement by the Secretary of the Interior as to the intended interpretation of this language.[15] The statement was incorporated into the report so as to make perfectly clear what the language meant: "Because the committee regards these provisions as being of key importance, it is including the [Department of Interior's] statement * * * in the report so that the intended operation of the provisions may be clear." S. Rep. No. 1737, 87th Cong., 2d Sess. 6 (1962). The Secretary of the Interior, in turn, stated that the restrictions would apply

> when any of the following conditions obtains in the country from which [the tuna] is offered for entry:

> Tropical Tuna Commission] the Secretary of Commerce shall promulgate additional regulations, with the concurrence of the Secretary of State, which shall become effective simultaneously with the application of the [domestic regulations] (1) to prohibit the entry into the United States, from any country when the vessels of such country are being used in the conduct of fishing operations in the regulatory area in such manner or in such circumstances as would tend to diminish the effectiveness of the conservation recommendations of the commission, of fish in any form of those species which are subject to regulation pursuant to a recommendation of the commission and which were taken from the regulatory area; and (2) to prohibit entry into the United States, from any country, of fish in any form of those species which are subject to regulation pursuant to a recommendation of the commission and which were taken from the regulatory area by vessels other than those of such country in such manner or in such circumstances as would tend to diminish the effectiveness of the conservation recommendations of the commission. * * *

[15] The original bill evidently endowed the Secretary of the Interior rather than the Secretary of Commerce with the responsibility for executing this statutory provision.

> 1. The country does not provide or arrange for the timely provision of pertinent statistics to the Commission.
>
> 2. *The country does not put into effect conservation measures applicable to its own fishermen adequate for the implementation of the Commission's recommendations.*
>
> 3. The country, having put conservation measures into effect, does not take reasonable enforcement action.
>
> 4. The country does not take measures which will enable it to control the landing in its ports and subsequent export of tuna taught in the regulatory area by nationals of third parties.

Id. at 7 (emphasis added).

This statement makes clear that the 1962 tuna amendments were intended to require Executive action in a variety of situations—one of which was the situation in which a foreign country failed to implement the international body's harvest recommendations. With respect to this situation, no discretion on the part of the Secretary was intended: If a foreign country failed to implement the harvest recommendations, that failure would automatically result imposition of the statutory sanctions on the foreign country.[16] Given the similarities between the tuna amendments and the Pelly Amendment, the clear congressional intent with respect to the tuna amendments confirms our conclusion that Congress, in enacting the Pelly Amendment, intended that fishing (or whaling) in excess of internationally set quotas would

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[16] We find no evidence of an interpretation of the 1962 amendments contrary to that expressed in their legislative history. No cases interpreting that statutory section were apparently decided. The Secretary did promulgate implementing regulations, *see, e.g.*, 50 C.F.R. § 281.5 (1984), but those regulations were consistent with the statement in the Senate Report.

per se "diminish the effectiveness" of the international fishery conservation program.[17]

This is not to say that Congress intended that the Secretary have no discretion whatever in making deter-

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[17] The 1962 amendments also provided:

> In the case of *repeated and flagrant fishing operations* in the regulatory area by the vessels of any country which *seriously threaten the achievement of the objectives of the commission's recommendations*, the Secretary of Commerce, with the concurrence of the Secretary of State, may, in his discretion, also prohibit the entry from such country of such other species of tuna, in any form, as may be under investigation by the commission and which were taken in the regulatory area. * * *

16 U.S.C. § 955(c) (emphasis added). Thus these amendments created a bipartite scheme for enforcing the tuna treaties. First, failure to implement or enforce the treaty recommendations would result in prohibition of imports of a particular tuna species from the offending country. Second, particularly serious violations of the treaty recommendations might, at the discretion of the Secretary of Commerce, result in prohibition of importation of all protected tuna species taken from the regulated area.

Given this bipartite scheme, the use of the "diminish the effectiveness" language in the Pelly Amendment seriously undermines two additional arguments made by the appellants. First, the "diminish the effectiveness" provision clearly did not apply only to flagrant "violations." *See* brief of Japanese appellants at 19-20. Another provision, with a greater potential sanction, was of such limited applicability. Thus such seriousness was not necessary for actions to qualify as "tending to diminish the effectiveness" of the Commission's recommendations.

Second, the "diminish the effectiveness" provision cited the commission's recommendations themselves, as opposed to the more serious provision of the 1962 amendments, which referred to achievement of the objectives of those recommendations. Thus the "diminish the effectiveness" provision centered on enforcement of the recommendations. The latter provision, on the other hand, was aimed at larger activities with potential for undermining the entire international program and its objectives. *Compare* brief for federal appellants at 27-28

minations as to what actions "diminish the effectiveness" of international programs. Indeed, we think such an extreme interpretation very unlikely. The Secretary may well, for example, have discretion in determining whether actions inconsistent with nonbinding international resolutions, *see Hearings Before the Subcommittee on Fisheries and Wildlife Conservation and the Environment of the House Committee on Merchant Marine and Fisheries*, 96th Cong., 1st Sess. 317 (1979) (hereinafter *Hearings*), JA 213, or actions that undermine achievement of binding regulations but that do not actually violate them "diminish the effectiveness" of those programs. In fact, it seems that, given the legislative history of the 1962 tuna amendments, the language may well have been chosen to allow certification in a variety of situations—some nondiscretionary and some discretionary. We decide simply that the specific type of situation here—clear violation of an internationally set fishing quota—was intended by Congress to trigger automatically the "diminish the effectiveness" determination and that no discretion as to whether to make this determination in this situation was given to the Secretary.

d. *Subsequent legislative history.* Although it is congressional intent relating to the Pelly Amendment that is important to us here, it is possible that subsequent legislative history could affect our conclusion as to congressional intent regarding the key statutory phrase. If Congress, at a later point, either ratified a different administrative construction or otherwise specifically indicated an intent contrary to its intent at the time the amendment was enacted, then those later statements of congressional intent may supersede the intent as originally expressed. On the other hand, if congressional statements and actions suggest an understanding con-

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(focusing on overall program objectives in Pelly Amendment context). In the 1962 tuna amendments, therefore, fishing in excess of the international body's recommendations was understood to be *per se* an action "tending to diminish the effectiveness" of those recommendations.

sistent with the initial intent, they will reinforce the weight to be given that intent.

The government makes two arguments relevant to the question of later congressional intent. First, it argues that the administrative practice under the Pelly and Packwood-Magnuson Amendments has consistently been that the Secretary determines that "intentional whaling or fishing activities in excess of duly established international quotas" "diminish the effectiveness" of those quotas only "in the absence of any mitigating factors which shift the balance." Brief for federal appellants at 20. Second, it argues that Congress, in the 1978 "wildlife products" amendments to the Pelly Amendment,[18] recognized significant discretion on the part of the Secretary in determining when actions "diminish the effectiveness" of the international programs. Far from supporting the government's position, however, the subsequent legislative history supports the interpretation that the Secretary has a nondiscretionary duty to certify when another country exceeds international fishing limits.

To begin with, even assuming that the government's characterization of past Executive practice is accurate (an assumption whose validity we need not resolve and that we therefore do not address[19]), we see no indications that Congress was either aware of or acquiesced in such a practice. In fact, the legislative history of the Packwood-Magnuson Amendment indicates an understanding of the certification process in the context of international whaling in excess of IWC quotas that consistently supports the conclusion we reached previously

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[18] *See* note 3 *supra*.

[19] We note simply that the parties' characterizations of this practice differ and that the record does not conclusively show what that practice has been. Any disagreement on this point does not present a genuine issue of material fact because, as we conclude, even if the government could show a consistent practice supporting its interpretation, there are no indications that it was acknowledged, let alone accepted, by Congress.

as to congressional intent with respect to the relevant provision of the Pelly Amendment.

The Packwood-Magnuson Amendment as it was finally enacted was added to the bill that eventually became law only after the bill had gone through the committee process. *See* H.R. Rep. No. 96-170, 96th Cong., 1st Sess. (1979) (amendment not included); S. Rep. No. 96-72, 96th Cong., Sess. 6 (1979) (amendment included in original form of (1) applying to all Pelly Amendment certification and (2) 100 percent reduction of fishery allocation in case of such certification). In such a situation, where voting Senators and Representatives do not have pertinent committee reports to inform their understanding of a proposed statute, the statements of the bill's sponsors on the floor of the Congress will be of unusually great significance in determining congressional intent, for the representations made by the sponsors will likely be relied upon by the Congress.

The statements made by the sponsors of the Packwood-Magnuson Amendment strongly support the conclusion that intentional whaling in excess of the IWC quotas was intended to trigger certification automatically. On the floor of the Senate, Senator Packwood summarized the projected operation of the proposed amendment:

> The core of the Packwood-Magnuson amendment is simply that any foreign nation which directly or indirectly conducts whaling operations or allows its nationals to conduct whaling operations or engage in trade in whale products in disregard of the conservation regulations of the International Whaling Commission shall be denied access to the rich fishery resources of our 200-mile zone.
>
> * * * *
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> * * * This amendment * * * will prohibit those nations which violate the conservation regulations of the International Whaling Commission from fishing within our 200-mile zone. As Senator Magnuson and I had initially drafted it, it would have prohibited them from totally fishing in the zone if they

violated the conservation regulations, but it would not have prohibited it until their permit to fish within the zone had to be renewed, and that would be up to a year.

Consequently, in working with the House managers we have reached a compromise which says that if any nation that fishes within the 200-mile zone violates the whaling conservation regulations, they will immediately, not having to wait until their permit can be renewed, lose 50 percent of their allocation for fishing within our 200-mile zone. If between that time and the time of the renewal of the permit they have not brought themselves in compliance with the regulations of the International Whaling Commission they will totally lose the right to fish in our 200-mile zone.

The reason that this amendment will be so effective is because it is going to force Japan and Russia, which are the two principal violators of the International Whaling Commission regulations, to choose between the continued taking and/or buying of illegal whale meat, to choose between that privilege and the privilege of fishing in our 200-mile zone. The privilege of fishing in our 200-mile zone is an infinitely superior economic privilege and any country in its right mind when forced to the decision between fishing in the 200-mile zone and giving up illegal whaling is going to give up illegal whaling. This amendment would have the effect of forcing that decision, and it is probably the most significant step this country can take toward protecting the remaining whales of the world.

125 Cong. Rec. 21742-21743 (1979).

Another statement, made by Senator Magnuson, is similar:

If a foreign country is certified by the Secretary of Commerce for violating or diminishing the effectiveness of international whaling regulations or for engaging in trade that diminishes the effectiveness of the international regime regulating the taking of

> whales, then that nation will be denied access to fish in our 200-mile fishery conservation zone. This amendment is a significant addition to the sanctions presently available under the Pelly Amendment (22 U.S.C. 1978).
>
> There are several things that should be pointed out in this regard. First, the Japanese Government recently prohibited the importation of whale products from non-International Whaling Commission member nations. This action of the Japanese should be sincerely commended—it is a significant step forward. However, this does not mean that the Japanese traders should become complacent now or misread the intent of this amendment. If Japan or any other nation imports whale products from IWC member countries and this trade is merely a routing mechanism for whales taken outside international regulation * * * or otherwise diminishes the effectiveness of whale programs described earlier, then this amendment will still be invoked.

Id. at 21743. This statement supports the interpretation we suggested above: Certification results from violations of regulations *or* from other actions which "diminish the effectiveness" of the regulations.

On the floor of the House, Representative Murphy, the chairman of the committee responsible for the bill, noted that "with respect to any nation which the Secretary of Commerce has certified as being in violation of the IWC, the Secretary of State is required to immediately reduce the unharvested portion of any allocation to such nation by not less than 50 percent." *Id.* at 22082-22083. Representative Oberstar, a committee member who had been active in passage of the Amendment, further stated that "[t]he Department of Commerce certifies a nation under the provisions of [the Pelly] amendment when a nation is found to have acted in a manner contrary to international agreements for the protection of a fishery resource." *Id.* at 22083. These

statements clearly do not support a hypothesis that Congress contemplated an administrative practice of discretionary determinations that actions were "diminishing the effectiveness" of international regulations in the face of intentional exceeding of fishing/whaling quotas or that Congress endorsed such a practice in any way.[20] In fact,

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[20] There are statements by one Congressman that the government cites in support of its argument that discretion in the "diminishing the effectiveness" determination was intended. *See* 125 Cong. Rec. 22083 (1979) (statement of Rep. Breaux) ("I trust that the Secretary of Commerce will be especially careful to examine all the facts surrounding a possible certification if this law is enacted since a certification from this point on can have disasterous [*sic*] effects on our U.S. fishing industry."); *Hearings* at 314-315, JA 210-211 (statement of Rep. Breaux) ("I understand under the Pelly amendment, as it exists, there are really two areas in which there are optional actions that can be taken by the administration. First, in certifying that a country is in violation of some international agreement, and there is a lot of flexibility in that certification[,] and, second, after a nation is certified, there is still discretion in determining whether a ban on imports of that country's products will in fact be imposed against that country. Therefore, under Pelly we have two discretionary features, whereas in the Packwood amendment, you are really taking all of the discretionary features and putting them into their first category which is the certification of a nation being in violation of an international agreement."); *id.* at 317, JA 213 (statement of Rep. Breaux) ("The Secretary has the discretion in making a certification decision.").

We are not persuaded that these isolated statements by one Congressman rebut the numerous statements of others to the opposite effect. Further, we note that the one statement on the floor of the House is ambiguous; it could mean simply that the Secretary should be sure of his facts before certifying a violation. We also note that the same Congressman made contrary statements at the same Hearings as those cited by the government. *See Hearings* at 312, JA 208 (statement of Rep. Breaux) ("The [Packwood] amendment would require the Secretary of Commerce to deny fishing permits to nationals of those foreign nations which were found to be in contravention of an international conservation agreement, to which the United States was a party."); *id.* at 323, JA 204

they plainly support our conclusion that Congress intended that treaty violations automatically trigger such a determination.

The government also argues that Congress, in 1978, defined the phrase "diminish the effectiveness" in a manner that supports the government's contention that it is allowed discretion in making such determinations. In the House Report to these amendments, which extended the Pelly Amendment to apply to "trade or taking which diminishes the effectiveness of any international program for endangered or threatend species," 22 U.S.C. § 1978(a)(2),[21] the Committee stated:

> Paragraph (1) of section 2 would amend [22 U.S.C. § 1978(a)] to add a new paragraph (2) to such subsection to authorize the President to embargo wildlife products whenever the Secretary of Commerce or the Secretary of the Interior finds that nationals of a foreign country, directly or indirectly, are engaging in trade or taking which diminishes the effectiveness of an international program for endangered or threatened species and the Secretary making such finding certifies such fact to the President. This paragraph makes it clear that the Secretaries' duties are mandatory, once an affirmative finding has been made. When the appropriate Secretary makes such a funding [*sic*], he must certify that fact to the President.
>
> The nature of any trade or taking which qualifies as diminishing the effectiveness of any international program for endangered or threatened species will depend on the circumstances of each case. In general, however, the trade or taking must be serious enough to warrant the finding that the effectiveness

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(statement of Rep. Breaux) ("[A]ctually what we are talking about under the Pelly amendment is a two-stage process. First, if a country is violating the terms of an international treaty, the Secretary of Commerce has to certify that he is doing that, and that is not a discretionary thing.").

[21] *See* note 3 *supra*.

> of the international program in question has been diminished. An isolated, individual violation of a convention provision will not ordinarily warrant certification under this section.

H.R. Rep. 95-1029, 95th Cong., 2d Sess. 15 (1978).

The government contends that this language indicates that Congress intended to give the Secretary discretion to determine that a country that is making "good faith efforts to bring itself into line with major conservation decisions" is not "diminishing the effectiveness" of those decisions. Brief for federal appellants at 14. We do not agree.

In assessing the relevance of this discription, it is crucial to remember that it applies only to the addition to the Pelly Amendment that addresses international programs for conservation of endangered and threatened species—not to the original fishery-related provision. Although this point may initially appear to be overly formalistic, we are convinced that a closer analysis shows it to be quite important.

The Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"), *opened for signature* March 2, 1973, [1976] 27 U.S.T. 1087, the international program that the 1978 amendments sought to enforce, *see* H.R. Rep. No. 95-1029, *supra*, at 11, operates in a manner entirely different from that of original Pelly Amendment. The fishery programs generally provide for concrete recommendations or actual quotas designating permissible and impermissible fishing (or whaling). CITES, on the other hand, provides for no such generally applicable regulations.

Rather, CITES is aimed at trade between nations. Substantively, it requires only import and export permits for trade in living specimens of species covered by the Convention or in products derived from dead specimens (*e.g.*, furs). The standard that member nations are pledged to honor in granting such permits is that the trade not be "detrimental to the survival" of the species

in question. Further, the determination is made by each country regarding the issuance or denial of a permit. *See* Articles III & IV, 27 U.S.T. at 1093-1097. No generally applicable trade or taking quotas are set under CITES. Thus CITES by its very nature allows for significant discretion on the part of the member nations that must implement it. *See, e.g., Defenders of Wildlife v. Endangered Species Scientific Authority*, 725 F.2d 726 (D.C. Cir. 1984) (addressing U.S. regulations for making determination with respect to bobcat exports). In light of this fact, the import of the House Report language becomes clearer: In the CITES context, the Secretary will almost always have to have discretion in making the relevant determination because there are essentially no nondiscretionary standards created under its auspices.[22]

In the fishery programs covered by the original Pelly Amendment (including the ICRW), however, there are many standards set that apply to all members: Discretion is vested in the international body rather than in the member nations. In these situations, of which the current case is one, discretion in making certification decisions is not necessary and appears, at least in this precise situation, not to have been intended by Congress. Consequently, we do not believe that this apparent expression of congressional intent with respect to the 1978 amendments rebuts the congressional intent regarding fishing and whaling in excess of internationally set quotas that was expressed in the legislative history of the 1971 and 1979 enactments. It simply confirms our initial conclusion that Congress intended that the Secretary exercise discretion in making *some* determinations (in contexts other than the one at hand).

In sum, we have considered the government's arguments that relate to subsequent congressional intent and we have concluded that Congress did not express an

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[22] The lone nondiscretionary standard is that there be the required permits. All other requirements necessitate exercise of discretion.

intent to change the meaning of the phrase "diminish the effectiveness" contained in the original Pelly Amendment in the type of context at issue in this case. Thus the conclusion we reached with respect to the original congressional intent regarding that phrase remains intact. To the extent that the subsequent legislative history is relevant, moreover, the evidence, particularly the statements of sponsors Packwood and Magnuson, fully supports our conclusion.

2. *Must certification result where the Secretary has made a determination that a foreign country is "diminishing the effectiveness" of an international fishery conservation program?* The next question we must address is whether, once the Secretary has determined that actions are "diminishing the effectiveness" of an international fishery conservation program, he must certify. The statute provides that when the Secretary determines that actions exist that diminish the effectiveness of a program he *shall* certify that fact to the President. The mandatory, nondiscretionary overtones of this word are conclusively corroborrated by the legislative history of this provision. Language such as the Secretary "must certify," S. Rep. No. 92-582, *supra*, at 2; 117 Cong. Rec. 47053 (1971) (statement of Sen. Stevens), "would be required to certify," *id.* at 34751 (statement of Rep. Dingell), and "[is directed] to certify," Pelly House Report at 6, supports the plain meaning interpretation of the statute that the duty to certify, once actions have been determined to "diminish the effectiveness" of an international program, is mandatory and nondiscretionary.

In sum, congressional intent with regard to the Pelly Amendment is as follows: Where a foreign nation allows its nationals to fish in excess of recommendations set forth by an international fishery conservation program, it has *per se* diminished the effectiveness of that program. In such a case the Secretary is mandated to certify the foreign country under the Pelly Amendment. Specifi-

cally, where a foreign country's nationals harvest whales in excess of IWC harvest quotas, certification is mandatory and nondiscretionary.

C. *Application of the Statute to the Instant Case*

The District Court found, and appellants do not controvert, that Japanese nationals have harvested sperm whales in excess of the harvest quotas set by the IWC (zero for the 1984-1985 season). *See American Cetacean Society, supra*, 604 F.Supp. at 1404, 1409. Based on this fishing, and on its interpretation of the statute as creating a nondiscretionary duty in the Secretary to certify where a nation allows whaling in excess of IWC quotas, the District Court issued the writ of mandamus requested by the plaintiffs. *See id.* at 1410-1411.

Based on our reading of congressional intent, we agree with the District Court that the Secretary had a nondiscretionary duty in these circumstances to certify Japan. So too do the plaintiffs have a clear right to relief. Finally, no other adequate remedy exists. Thus the legal requirements for issuance of the writ have been properly met.

Nor do we believe that the District Court abused its discretion in this instance. *The 13th Regional Corp., supra*, 654 F.2d at 760. The Japanese intervenor-appellants argue that the relief granted here, which in effect abrogates an agreement entered into by the Executive Branch with a foreign country, was an abuse of the District Court's equitable powers. *See* brief for Japanese appellants at 35-37. Although we are aware, as was the District Court, of the gravity of its order, we do not believe that it abused its discretion.

As we determined above, the executive agreement in question was entered into in violation of the Secrtary's statutory mandate. Although it is urged that deference to the Executive is particularly apt and intrusion by the judiciary particularly inapt in the foreign affairs context, it is imperative to remember that the Legislative Branch,

by explicit constitutional provision, has the power to regulate foreign commerce. *See* U.S. Const., Art. I, § 8. And, since the judiciary's role is to declare what the law is when Congress has acted, *see Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), we must perform that duty even in this delicate context.[23]

IV. Conclusion

The District Court's decision granting summary judgment in favor of the plaintiff-appellees and ordering the Secretary of Commerce to certify Japan under 22 U.S.C. § 1978(a)(1) is affirmed. Because of the circumstances of this case, the mandate of this court is stayed for 90 days from the date of this opinion.

So ordered.

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[23] The Japanese appellants raise two additional arguments. First, they contend that the Secretary was required to promulgate rules regarding his interpretation of the governing statutory provision. Given that the issue here was one of congressional intent, however, whether or not the Secretary has promulgated interpretive rules is irrelevant. *See also SEC v. Chenery Corp.*, 332 U.S. 194 (1947).

Second, they contend that imposition of the Packwood-Magnuson sanction deprives them of a property right (the fishing allocation granted by 16 U.S.C. § 1821(e)(1)) without due process and without a hearing "on the record" provided by the Administrative Procedure Act. 5 U.S.C. § 556(d) (1982). These claims are also without merit. The organic statutes here provide no opportunity for a hearing at all, let alone a hearing on the record. Consequently, § 556(d) does not apply. *See, e.g., United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 757 (1972). Further, with respect to the due process claim, even assuming that applying the Packwood-Magnuson sanction would deprive these appellants of property rights, we conclude that, in the particular circumstances of this case, they have been afforded adequate due process: The underlying facts of the case are not at issue, *see American Cetacean Society v. Baldridge* [*sic*], 604 F.Supp. 1399, 1404, 1409 (D. D.C. 1985), and these appellants have participated in these proceedings, in which the legal issues have been fully briefed and argued.

OBERDORFER, *District Judge* (dissenting): With regret and respect I must dissent.

I cannot agree that, in the circumstances of this case, the Pelly Amendment, 22 U.S.C. § 1978, should be construed to impose upon the Secretary of Commerce a ministerial duty to certify Japan solely because it is not adhering to an international whaling quota which is not binding on it. The Pelly Amendment, enacted in 1971, provides in pertinent part that

> [w]hen the Secretary of Commerce determines that nationals of a foreign country, directly or indirectly, are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program, the Secretary of Commerce shall certify such fact to the President.

22 U.S.C. § 1978(a)(1). The Packwood-Magnuson Amendment, which became law in 1979, requires the Secretary of State, upon receipt of a certification under the Pelly Amendment, to reduce by 50 percent the catch allowed the certified nation and its nationals in the waters within 200 miles of the coasts of the United States. 16 U.S.C. § 1821(e)(2). Brief reconsideration of the essential facts on which the Secretary relied in applying these statutes in this case will help explain my concerns.

I.

The International Convention for the Regulation of Whaling ("Convention") created an International Whaling Commission ("Commission") with authority to state, but not to enforce, limits or quotas for nations taking whales from the oceans of the world. In 1981, the Commission set what is in effect a zero catch limit for the Western Division Stock of North Pacific sperm whales. To do so, the Commission amended the Schedule which sets quotas or catch limits for various species of whales during defined seasons and in particular areas of the world. The Schedule now provides, among other things,

that "[n]o [sperm] whales may be taken from this stock until catch limits . . . are established by the Commission." Footnote 1 to Table 3, *reprinted in* Joint Appendix (J.A.) at 67.

Japan entered a timely objection to the 1981 Schedule. *See* Article V-3 of the Convention, *entered into force* Nov. 10, 1948, 62 Stat. 1716, T.I.A.S. 1849, *reprinted in* J.A. at 50; Table 3, 1983 Convention Schedule, J.A. at 67 n.*. By the terms of the Convention, this objection relieved Japan of any legal obligation to honor the 1981 quota. The Commission later agreed that Japan could take 450 sperm whales in the 1982 coastal season and 400 sperm whales in the 1983 coastal season. *See Review of the 34th International Whaling Commission Meeting: Hearing Before the Subcommittee on Human Rights and International Organizations of the House Comm. on Foreign Affairs*, 97th Cong., 2d Sess. 19 (1982), *reprinted in* Appellee's Appendix at G-18. At its annual meeting in June 1984, the Commission declined to amend the Schedule as it applied to sperm whales. As a result, those nations which had not objected to the Schedule will be in violation of the Convention if they take sperm whales before the Commission establishes a new quota. J.A. at 77. Japan, however, did not withdraw its objection and therefore was not obligated under the Convention to observe the zero catch limit. *See* 1984 Amendments to the Schedule, J.A. at 77 n.*.

In 1982, the Commission purported to impose a moratorium on all commercial whaling, effective with the end of the 1985 coastal season and the end of the 1984/85 pelagic whaling season. J.A. at 65. Japan also objected to this moratorium and so is not legally obligated to observe it either. J.A. at 65 n.*. Japan nevertheless anticipated that, notwithstanding its objections and the absence of any obligation under international law to honor either the 1981 quota or the moratorium, it might be subject to certification and consequent sanctions by

the United States acting on the authority of the Pelly and Packwood-Magnuson Amendments. Accordingly, Japan commenced negotiations with American officials.[1] On November 13, 1984, Yasushi Murazumi, Charge d' Affairs *ad interim* of Japan, sent a letter to the Secretary of Commerce proposing a compromise. In that letter, Japan recognized "the need to take measures including the withdrawal of the objection mentioned above in order to avoid a confrontation between our two countries," but requested "an additional period of time for the purpose of minimizing the economic and social hardship of those who are engaged in commercial sperm whaling." J.A. at 78. Assuming that the Secretary had the discretion to determine when certification was appropriate, Japan requested

> that, as long as Japanese commercial whaling is conducted in a manner as indicated in the arrangement set forth in the Summary of Discussions attached to this letter, you not consider that the whaling will diminish the effectiveness of the Convention or its conservation program and not certify such whaling as provided for in the Pelly Amendment or the Packwood-Magnuson Amendment.

J.A. at 79. The Summary of Discussions memorialized negotiations between Dr. John V. Byrne, United States Commissioner to the International Whaling Commission, and Mr. Hiroya Sano, Director-General of the Fisheries Agency of the Japanese Ministry of Agriculture, Forestry and Fisheries. Significantly,

> [t]he heads of the delegations shared the view that [an arrangement whereby the United States Secretary of Commerce might refrain from "certifying" sperm whaling by Japanese nationals] might be possible, subject to satisfactory resolution of certain de-

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[1] This suit was filed on November 8, 1984, about three weeks after the negotiations commenced.

> tails and to approval and implementation by the cognizant authorities of each Government.

J.A. at 80.[2]

The proposed arrangement permitted Japan to take 400 sperm whales during each of the 1984 and 1985 coastal seasons without triggering certification, provided that Japan withdrew, by December 13, 1984, its objection to the 1981 Schedule. J.A. at 81. The agreement also permitted Japan to catch up to 200 sperm whales per season during the 1986 and 1987 coastal whaling seasons, and to continue minke and Bryde's whaling for two years beyond the general moratorium date. In exchange, Japan would withdraw its objection to the Commission moratorium on commercial whaling. The effect of this withdrawal would be that "Japanese commercial coastal whaling will cease following the 1987 coastal season and Japanese commercial pelagic whaling will cease following the 1986/87 pelagic season . . . ." J.A. at 81.

The Secretary of Commerce responded to the letter on the day on which it was sent. He stated:

> After consulting with the United States Commissioner to the International Whaling Commission (IWC), I have concluded that commercial harvests of whales by Japanese nationals within the limits and under the circumstances set forth in the Summary of Discussions attached to your letter would not diminish the effectiveness of the International Convention for the Regulation of Whaling, 1946, or its conservation program.

J.A. at 83. On December 11, 1984, in reliance on the Secretary's promise, made on behalf of the United States, Japan withdrew its objection to the Schedule amendment. J.A. at 106. On April 5, 1985, Japan informed

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[2] There is no indication that the parties originally considered the term "cognizant authorities" to include the Judicial Branch of the United States government.

the Secretary that it would withdraw its objection to the moratorium within five days of a decision by this court in favor of the United States.

II.

There is a threshold question which has not been addressed by the majority: does this case present a justiciable question? Although "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance," *Baker v. Carr*, 369 U.S. 186, 211 (1962), the justiciability issue is important and should ordinarily be decided before reaching the merits. *Cf. Adams v. Vance*, 570 F.2d 950, 954 (D.C. Cir. 1977). One factor in determining the justiciability of a foreign affairs question is "the possible consequences of judicial action." *Baker v. Carr*, *supra*, 369 U.S. at 211-12. *Baker v. Carr* further warned about "embarrassment from multifarious pronouncements by various departments on one question." 369 U.S. at 217. Although Congress joins the Executive in setting the agenda for foreign relations, *see Oetjen v. Central Leather Co.*, 246 U.S. 197, 302 (1918), "[t]he President alone has the power to speak or listen as a representative of the nation." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936). Thus, "the President is exclusively responsible" for the "conduct of diplomatic and foreign affairs." *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950); *see also Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

Yet, the district court's order has added the Judicial Branch's voice to this delicate process. The order, here approved, will in effect require the Secretary to dishonor the United States' commitment, upon which Japan relied in withdrawing its objection to the 1981 quota. Moreover, the district court's order has entangled the judiciary in foreign policy by causing Japan to condition its com-

mitment to honor the moratorium on a favorable decision by this Court.[3]

The hazards of such judicial involvement in issues ordinarily reserved for the political departments of our government could make this controversy unsuitable for judicial action. *Cf. Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1547 & n.5 (Tamm, J., dissenting). For present purposes, however, it is not necessary to perform the "discriminating analysis"[4] required to determine whether this case is justiciable. The justiciability issue has serious constitutional implications which make it appropriate to bypass the question and proceed to the merits. *See Adams v. Vance*, *supra*, 570 F.2d at 954 n.7.

This is not to say that the factors which call justiciability into question are not relevant here. In my view, these factors heighten the need for forbearance by the courts in the absence of a clear command from Congress. In *Adams v. Vance*, for example, a panel of this court declined to reach the question of justiciability and proceeded to the merits, emphasizing that:

> A request for an order directing action by the Secretary of State in foreign affairs plainly constitutes such an instrusion into the core concerns of the executive branch]. Court must beware "ignoring the delicacies of diplomatic negotiation, the inevitable bargaining for the best solution of an international conflict, and the scope which in foreign affairs must be allowed to the President."

Id. at 954 (quoting *Mitchell v. Laird*, 488 F.2d 611, 616 (D.C. Cir. 1973)).[5] *Adams* confirms that we should be

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[3] *Cf.* note 2 *supra*.

[4] *Baker v. Carr*, *supra*, 369 U.S. at 211.

[5] The *Adams* court made this statement in the context of an expedited appeal from a preliminary injunction, and its holding does not of its own force preclude a decision that the

particularly hesitant to contradict the Executive's interpretation of a statute relied upon to form an international agreement, unless that interpretation is clearly erroneous. I am not persuaded that the Secretary's interpretation of the Pelly Amendment was clearly erroneous.

III.

A.

The Pelly Amendment, by its terms, requires the Secretary of Commerce to examine the "manner" and "circumstances" under which foreign nationals are conducting fishing operations and, more important here, to determine whether fishing operations so conducted "diminish the effectiveness" of a fishery conservation program. This language means to me that some deviations from Commission quotas must be certified, but others need not be if the Secretary determines that the manner and circumstances of the fishing operations would not diminish the effectiveness of a program.

The majority concedes that "the critical statutory phrase, 'diminish the effectiveness,' is not defined in the statute." Majority Opinion at 19. To bridge the gap between what the statute actually says and a clear requirement to certify solely for violation of a quota, the Court turns to "traditional tools of statutory construction." [6]

The Court's analysis of the legislative history of the relevant statues is an impressive, but far from conclusive, demonstration that congressional sponsors of the Pelly Amendment intended that the Secretary certify any deviation by a nation or its nationals from a Commission quota. For example, the legislative history suggests that Congress intended the Secretary to certify

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Secretary has a statutory duty enforceable by mandamus. *Cf. Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1521 n.81 (D.C. Cir. 1984) (*en banc*).

[6] *Chevron, U.S.A. v. NRDC*, 104 S. Ct. 2778, 2782 n.9 (1984).

nations that "flaunt," "ignore," or flagrantly violate international quotas. The use of such language strongly implies that Congress understood the Pelly Amendment as giving the Secretary the discretion to distinguish between an egregious violation warranting certification and an accommodation which bent but did not break the program. Here, Japan has not simply "flaunted" the Convention quota—to the contrary, it has acknowledged the need to withdraw its objections to the 1981 Schedule Amendment. *See* J.A. at 78. Accordingly, Japan has negotiated an arrangement designed to accommodate its needs with the program articulated by the Convention. Regardless of whether the Secretary must certify nations that continue to violate quotas without entering into any agreement with the United States—a question which we need not decide—the legislative history does not so plainly alter the language of the statute as to leave the Secretary no discretion to decide whether Japan's stance *vis á vis* the 1981 quota and the moratorium "diminishes the effectiveness" of the Convention.

Nevertheless, if this statute involved domestic affairs, I might be able to endorse a decision based on this secondary evidence of congressional intent. For as the majority points out, "[t]he requirement that a duty be 'clearly defined' to warrant issuance of a writ does not rule out mandamus actions in situations where the interpretation of the controlling statute is in doubt." *13th Regional Corp. v. U.S. Dept. of Interior*, 654 F.2d 758, 760 (D.C. Cir. 1980). But the mandamus cases that

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[1] *See Council of and for the Blind of Delaware County v. Regan*, 709 F.2d 1521 (D.C. Cir. 1983) (*en banc*); *13th Regional Corp., supra*. Similarly, the remaining cases cited by the majority for its theory of legislative interpretation do not implicate foreign affairs. *See Chemical Manufacturers Ass'n v. NRDC*, 105 S. Ct. 1102 (1985); *Chevron, U.S.A., Inc. v. NRDC*, 104 S. Ct. 2778 (1984); *American Methyl Corp. v. EPA*, 749 F.2d 826 (D.C. Cir. 1984); *State of Montana v. Clark*, 749 F.2d 740 (D.C. Cir. 1984); *Rettig* v. *Pension Benefit Guaranty Corp.*, 744 F.2d 133 (D.C. Cir. 1984).

look to secondary evidence to resolve doubts about Congress' intent [7] do not involve "international relations." [8] Moreover, it is not a satisfactory answer to say that the Executive Branch and the Japanese could have read the same legislative history materials and reached the same conclusion reached by the majority and the court below. Nor would it have been appropriate to expect either Japan or the Executive Branch to seek a declaratory judgment about the Secretary's authority to enter into this agreement. *See Golden v. Zwickler*, 394 U.S. 103, 108 (1969). The international relations implications of this case persuade me that, in the absence of a congressional mandate, clear on its face, we should neither find nor enforce a ministerial duty.

B.

Even assuming that the Pelly Amendment can be interpreted by use of legislative history materials to impose an obligation to act that is both "peremptory, and clearly defined," it is important to recognize that "[t]he court has additional authority to refrain from issuing a writ, for the 'exercise of the power of mandamus is a matter committed to the sound discretion of the trial court.'" *13th Regional Corp., supra*, 654 F.2d at 760 (quoting *Cartier v. Secretary of State*, 506 F.2d 191, 199 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 947 (1975)). Because "mandamus is itself governed by equitable considerations and is to be granted only in the exercise of sound discretion," *Whitehorse v. Illinois Central R.R. Co.*, 349 U.S. 366, 373 (1955), "the case must be found by a court to be clear and compelling on both legal *and equitable* grounds for a writ to issue." *13th Regional Corp., supra*, 654 F.2d at 760 (emphasis added); *see id.* at 762-63. Neither the majority nor the court below have addressed these equitable considerations.

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[8] *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

In my view, the equities (including the necessity of avoiding the thorny constitutional question related to justiciability) weigh heavily in favor of the Secretary. The Supreme Court has recently reminded us that "[g]reat nations, like great men, should keep their word." *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting) (quoted with approval in *CIA v. Sims*, 105 S. Ct. 1881, 1891 n.20 (1985)). The ultimate equity here is that the United States, speaking through the Secretary of Commerce, has given its word in apparent reliance on the language of an Act of Congress. Japan has made a reciprocal promise in reliance on the same language and the Secretary's interpretation of it. In these circumstances, I would not approve an order directing the Secretary to certify Japan.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term 1984
Civil Action No. 84-3414

No. 85-5251
AMERICAN CETACEAN SOCIETY, et al.
v.

MALCOLM BALDRIGE, Secretary of Commerce, et al. Appellants

JAPAN WHALING ASSOCIATION, et al.

No. 85-5252

AMERICAN CETACEAN SOCIETY, et al.

v.

MALCOLM BALDRIGE, Secretary of Commerce, et al.

JAPAN WHALING ASSOCIATION, et al., Appellants

Before WRIGHT and TAMM, Circuit Judges, and OBERDORFER, * District Judge.

ORDER

It is ORDERED by the court, sua sponte, that the opinion for the court filed by Circuit Judge Wright on August 6, 1985 be, and it is hereby, amended as follows:

Page 6: Change "actons" in line 2 of text to "actions"

Page 15: Insert "v. U.S. Dep't of Interior" after "Corp." in line 1 of the continuation of footnote 10

Page 18: Delete the period at the end of line 4 from the bottom of text

Page 25: Change "taught" in line 13 of text to "caught"

Page 34: Change "discription" in line 13 of text to "description"

Page 37: Change "The" in line 2 of the third full paragraph to "See"

Per Curiam
For the Court

/s/ George A. Fisher
George A. Fisher
Clerk

*Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. 292(a).

APPENDIX B

OPINION AND ORDER OF THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN CETACEAN SOCIETY, et al.,
Plaintiffs,
v.
MALCOLM BALDRIDGE, et al.,
Defendants,
and,
THE JAPANESE WHALING ASSOCIATION &
THE JAPANESE FISHING ASSOCIATION,
Defendant-Intervenors

Civil Action No. 84-3414

ORDER

In accordance with the Opinion issued of even date herewith, it is by the Court, this 5th day of March, 1985,

ORDERED that the plaintiffs' motion for summary judgment be and the same is hereby granted, and that the defendants' and defendant-intervenors' cross-motions be and the same are hereby denied, and it is

FURTHER ORDERED that the defendant-intervenors' motion to dismiss be and the same is hereby denied, and it is

FURTHER DECLARED AND ADJUDGED the defendant Baldridge and his subordinates, and defendant Schultz and his subordinates, have no discretion not to certify Japanese sperm whaling in violation of the IWC zero sperm whale quota, and reduce Japan's fishing allocation since such activities diminish the effectiveness of the International Convention for the Regulation of Whaling, and it is

FURTHER ORDERED that defendant Baldridge and his subordinates and defendant Schultz and his subordinates be permanently enjoined from agreeing not to certify, and from failing to certify, any whaling activities by nationals of Japan that violate IWC whaling quotas, and from agreeing not to reduce, and failing to reduce, Japanese fishing quotas in consequence of such certification, and it is

FURTHER ORDERED that defendant Baldridge shall forthwith certify to the President, pursuant to the Pelly

and Packwood-Magnuson Amendments, the Japanese sperm whaling which has taken place in violation of the IWC zero sperm whaling quota.

/s/ Charles R. Richey
Charles R. Richey
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN CETACEAN SOCIETY, et al.,)
Plaintiffs,)
v.)
MALCOLM BALDRIDGE, et al.,)
Defendants,)
and,)
THE JAPANESE WHALING ASSOCIATION & THE JAPANESE FISHING ASSOCIATION,)
Defendant-Intervenors)

Civil Action No. 84-3414

A P P E A R A N C E S

For the Plaintiffs, William D. Rogers, James A. Beat and John F. Libby of Arnold & Porter, Washington, D.C.

For the Defendants, F. Henry Habicht II, Assistant Attorney General, Donald A. Carr and Diane H. Kelly, U.S. Department of Justice, Washington, D.C., Peter H. Flournoy, of counsel, Office of the Legal Advisor, U.S. Department of State, Washington, D.C. and Robert McManus, General Counsel, National Oceanic and Atmospheric Administration, Department of Commerce, Washington, D. C.

For the Defendant-Intervenors, Scott C. Whitney and Steven R. Perles, Washington, D.C.

TABLE OF CONTENTS

INTRODUCTION B-7

FACTUAL AND STATUTORY BACKGROUND ... B-10

a) The Pelly Amendment B-12

b) The Packwood-Magnuson Amendment B-15

c) The IWC Whaling Quotas B-17

d) The Nov. 13, 1984 Exchange of Letters B-19

ANALYSIS

I. CERTIFICATION BY THE SECRETARY OF COMMERCE OF WHALING IN EXCESS OF THE IWC QUOTAS IS MANDATORY AND NONDISCRETIONARY B-22

a) Fishing In Violation Of Quotas Established Under An International Convention Was The Specific Wrong To Which Congress Intended Both Pelly and Packwood-Magnuson To Apply B-24

b) Agency Interpretation And Application Of Pelly And Packwood-Magnuson Has Consistantly Resulted In Certification For Violations International Quotas . B-30

c) The Intervenors' Motion for Summary Judgment Must Be Denied B-35

II. THE MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED IS DENIED AS THE INCORRECT LEGAL STANDARD HAS BEEN APPLIED AND AS AN INJUNCTION IN THE NATURE OF MANDAMUS IS PROPER WHERE, AS HERE, A NONDISCRETIONARY ACT IS INVOLVED B-41

CONCLUSION B-45

UNITED STATES DISTRICT COURT
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AMERICAN CETACEAN SOCIETY, et al.,
Plaintiffs,
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and,
THE JAPANESE WHALING ASSOCIATION & THE JAPANESE FISHING ASSOCIATION,
Defendant-Intervenors

Civil Action No. 84-3414

OPINION AND ORDER OF CHARLES R. RICHEY, UNITED STATES DISTRICT JUDGE

This action is before the Court on Cross-Motions for Summary Judgment, as well as a Motion to Dismiss for failure to state a claim upon which relief can be granted. The numerous plaintiffs in this case are all wildlife conservation groups which share a common dedication to preserving and protecting endangered species. The defendants are Secretary of Commerce Malcolm Baldridge and Secretary of State George Schultz, both being sued in their official capacity. In addition,

the Japanese Whaling Association and Japanese Fisheries Association (hereinafter "JWA/JFA") have been allowed into this action as defendant/intervenors.

Plaintiffs contend that Secretary Baldridge violated a clear non-discretionary duty when he failed to certify to the President that Japanese nationals were engaged in sperm whaling in violation of the International Whaling Commission's (hereinafter "IWC") zero sperm whale quota for the 1984-85 season. Plaintiffs seek a declaratory judgment from this Court that such failure to certify was in violation of the Packwood-Magnuson Amendment to the Magnuson Fishery Conservation and Management Act of 1976. 16 U.S.C. §§ 1821(e)(2)(A)(1) and (B). Plaintiffs also request that the Court declare and adjudge that such whaling activities by any nation in excess of the IWC quota is necessarily an activity which "diminishes the effectiveness" of the International Convention for the Regulation of Whaling (hereinafter "the Convention"), the multilateral treaty which the IWC oversees.

Additionally, plaintiffs seek a permanent injunction from this Court

enjoining both Secretaries Baldrige and Schultz, and their subordinates, from agreeing not to certify, and from failing to certify, any whaling activities by nationals of Japan that violate IWC whaling quotas, and from agreeing not to reduce, and from failing to reduce, Japanese fishing quotas in consequence of such certification.

The defendants argue that Secretary Baldridge's actions which give rise to this suit were within the scope of his discretion to determine what activities diminished the effectiveness of the Convention, and that his decision not to certify was actually designed to insure its continued effectiveness. Therefore, the defendants argue, the Packwood-Magnuson automatic sanction was never triggered. The JWA/JFA argue that the Japanese were never technically in violation of the Convention, and, therefore, the Japanese cannot be certified. In addition, they raise other arguments dealing with what they percieve as irregularities under the Administrative Procedure Act 5 U.S.C. §551, et seq. They have also filed a motion to dismiss the complaint under Fed. R. Civ. P. 12(b)(6)

for failure to state a claim upon which relief can be granted. In this motion, the intervenors argue that plaintiffs fail to meet the appropriate standard for a permanent injunction in the nature of mandamus and that therefore the complaint cannot stand.

For the reasons set forth below, the Court denies the Motion to Dismiss, and grants the Plaintiffs' Motion for Summary Judgment.

FACTUAL AND STATUTORY BACKGROUND

For the past thirty five years, the international whaling industry has brought about the systematic devestation of the major whaling populations on this planet. Although a central focus of many cultures over the past centuries, whaling has gone beyond cultural identity and into the realm of international business. The whale was originally hunted for its oil, its ivory teeth and its meat. It was hunted in small numbers, as the technology of the early whalers limited their ability to catch more than a few whales each season. This has changed drastically, however, since the end of World War II. Improvements in technology, such

as larger and stronger whaling ships and explosive harpoons, made whaling as big business both practical and profitable. New uses for whale products began to be discovered. The whale oil, once used for heat and light, is now used as a high-grade industrial lubricant. The meat, only rarely used for human consumption, is a major ingrediant in pet food and agricultural feed. The whalers, unrestrained by any regulations regarding their activities, took as many whales as they could find. By the early 1960's, blue and humpback whales had been virtually exterminated, driven to "commercial extinction," where there were too few remaining to make hunting them worthwhile. (Garrett Affidavit at 1). By the early 1970's, the major populations of large baleen whales in the Antarctic and North Pacific oceans had been destroyed. Fin and sei whale populations had been likewise reduced to small percentages of their original levels. Id. The whaling industry then refocused its efforts on the remaining available species: the sperm whale, the Bryde's whale, and the smaller minke whale.

The International Convention for the

Regulation of Whaling, which created the IWC, arose as a result of the recognized need for some kind of coordinated regulation of international whaling. The Convention was signed in 1946 and entered into force on November 10, 1948. 62 Stat. 1716, T.I.A.S. No. 1849. Under the the terms of the Convention, global annual whaling quotas and regulations restricting whaling methods are to be established at annual and special meetings of the IWC. Convention, Art. V ¶1. Originally, the IWC was used as a vehicle for the control of whale oil prices. However, since 1972 it has steadily evolved as an agency promoting conservation rather than commercialization of whales.

a) The Pelly Amendment

The United States government was a signatory of the Convention and is a member nation in the IWC. It has consistently taken the role of enforcing the quotas as set by the IWC with the threat of economic sanctions against countries which fail to adhere to the IWC limits. In 1971, Congress enacted the Pelly Amendment to the Fishermen's Protective Act of 1967, 22 U.S.C. §1978, for the

express purpose of creating a sanction against countries that refused to conduct their fishing operations consistent with international fishery conservation programs. The Pelly Amendment states that when the Secretary of Commerce determines that nationals of a foriegn country are conducting fishing operations which "diminish the effectiveness" of any international fisheries conservation program to which the United States is a party, he shall so certify to the President. 22 U.S.C. §1978(a)(1). The President may then direct the Secretary of the Treasury to prohibit the importation of fish products of the offending nation. 22 U.S.C. §1978(a)(4). Within sixty days of certification, the President is required to notify Congress of any action taken as a result of such certification, or of his reasons for taking no action or taking only limited action against the offending nation. 22 U.S.C. §1987(b).

On November 12, 1974, the Secretary of Commerce certified both Japan and the Soviet Union under the Pelly Amendment. The IWC had set a quota of 5,000 Antarctic minke whales for the 1973-74 season. Both nations had objected to the quota

under the procedures set forth in the Convention. The Secretary determined, however, that when the Soviet Union took 4,000 minke whales and Japan took 3,713, that both countries had acted to "diminish the effectiveness" of the Convention. On January 19, 1975, former President Gerald R. Ford made it clear that any taking of whales in excess of IWC quotas would trigger the Pelly Amendment certification, saying that "exceeding the quotas will diminish the effectiveness of the program." White House Press Release, January 17, 1975. (Plaintiff's Brief at 8). The imposition of sanctions was forstalled, however, when both Japan and the Soviet Union then agreed to accept the 1974-75 quotas. Id.

The Pelly Amendment has been brought into play several times since. On December 14, 1978, the Secretary of Commerce certified Chile, Peru and the Republic of Korea for exceeding IWC quotas. At that time none of these nations were members of the IWC or signatories of the Convention. Within sixty days after certification, all three had either joined the IWC or committed to do so by the next scheduled annual meeting. Again, in 1979, the

threatened certification of Spain led that country to agree to adhere to the IWC fin whale quota for that year, despite having filed a formal objection. Preparations for the 34th International Whaling Commission Meeting: Hearings before the Subcomm. Human Rights and International Organizations of the House Comm. on Foreign Affairs, 97th Cong., 2d Sess. 11 (1982) (Congressional Research Service Report).

b) The Packwood-Magnuson Amendment

In 1979, Congress determined that the Pelly Amendment, however effective, was inadequate to the task of persuading commercial whaling nations to adhere to IWC decisions. Accordingly, Congress enacted the Packwood-Magnuson Amendment to the Magnuson Fishery Conservation and Management Act of 1976 (hereinafter "Packwood-Magnuson"). 16 U.S.C. § 1821. That Act has, since 1976, regulated commercial fishing within the United States 200-mile fishery conservation zone. It provides for the Secretary of State to grant foriegn nations annual allocations of allowable levels of fishing within the 200-mile zone. Id.

Packwood-Magnuson amended that Act to provide that the Secretary of Commerce would have the responsibility to ascertain and certify whether "nationals of a foreign country, directly or indirectly, are conducting fishing operations or engaged in trade or taking which diminishes the effectiveness of the International Convention for the Regulation of Whaling." 16 U.S.C. §1821(e)(2)(A)(1). Upon such certification, the Amendment mandates that the fishing allocation of the offending nation "shall be reduced by the Secretary of State, in consultation with the Secretary [of Commerce], by not less than 50 percent." 16 U.S.C. §1821(e)(2)(B). If the certification by the Secretary of Commerce is terminated within one year, the suspended allocation may be reinstated. 16 U.S.C. §1821(e)(2)(C)(iii). If the certification is not terminated within one year, the suspended allocation is permanently rescinded and the Secretary of State "may not make any allocation to that country . . . until the certification is terminated." 16 U.S.C. §1821(e)(2)(D).

The threat of automatic sanctions under Packwood-Magnuson has proved to be

an effective incentive in the enforcement of the IWC regulations and quotas. In 1980, both the Republic of Korea and Taiwan agreed to adhere to IWC regulations not directly involving whaling quotas, when faced with the possibility of Packwood-Magnuson sanctions. Preparations for the 34th International Whaling Commission Meeting, supra, at 11. The former United States representative to the IWC views the automatic sanctions under Packwood-Magnuson to be the foundation upon which the present system of international whaling controls has been built. (Affidavit of Thomas Garrett ¶ 9).

c) The IWC whaling quotas

In 1981 the IWC voted to amend the quota tables to provide that no sperm whales could be taken in any future year unless a specific quota was established by the IWC for that year. The vote on that issue was 25 to 1, with Japan casting the lone opposition vote. Review of the 33rd International Whaling Committee Meeting: Hearing before the Subcomm. on Human Rights and International Orgainizations of the House Comm. on Foriegn

Affairs, 97th Cong., 1st Sess. 11 (1981) (Staff Report).

At the next annual meeting, in July, 1982, the IWC voted to impose a five year moratorium on all commercial whaling in order to allow depleted whale stocks to regenerate, and for scientists to have an opportunity to gather more extensive data on the populations and distributions of whale stocks to determine whether commercial whaling could be safely resumed at some future date. Review of the 34th International Whaling Commission Meeting, 97th Cong., 2d Sess. 17 - 19 (1982) (Staff Report). Of the member nations of the IWC, only Japan, the Soviet Union and Norway filed objections to the moratorium.

In July 1982, Japan requested, and was granted, two additional years of sperm whaling through the 1983-84 season. This additional grant was part of a compromise effort to insure passage of the general whaling moratorium to begin in 1986. No sperm whale quotas was established by the IWC for the 1984-85 season. Thus, under the terms of the 1981 amendment to the quota tables, any sperm whaling during the 1984-85 season would be in

violation of the zero quota which resulted.

d) The November 13, 1984 exchange of letters

The Japanese government, apparently well aware of the threat of Packwood-Magnuson sanctions, entered into negotiations with the United States Commissioner to the IWC. On November 13, 1984, the Department of Commerce released copies of an exchange of correspondence between Yasushi Murazumi, Japanese Charge d'Affaires in Washington, D. C., and Secretary Baldridge. Attached to the letter from Murazumi was a document entitled "Summary of Discussions on Commercial Sperm Whaling in the Western Division Stock of the North Pacific, November 1-12, 1984, Washington, D. C." This document described the negotiations between Mr. John V. Byrne, the U. S. Commissioner to the IWC, and Mr. Hiroya Sano, Director General, Fisheries Agency, Ministry of Agriculture, Forestry and Fisheries of Japan. Later the same day, the Secretary responded by letter to Mr. Murazumi in which the Secretary pledged not to certify additional sperm

whaling by Japan during the 1984-85 and 1985-86 seasons, provided that the Japanese took the steps outlined in its letter. Specifically, the Secretary concluded that if Japan followed the promises made in its letter to eventually come into voluntary compliance with the IWC sperm whale and moratorium decisions, Japan would not be acting in a manner which would diminish the effectiveness of the convention, thus avoiding the triggering of Packwood-Magnuson sanctions.

The arrangement worked out between the Secretary and Japan would allow the Japanese whaling fleet to take up to 400 sperm whales during each of the 1984 and 1985 seasons, on the condition that they promise to cease all commercial sperm whaling at the end of the 1987 season. Japan in return agreed to withdraw its objection to the IWC quota table amendment which created the zero quota by no later than December 13, 1984. On December 11, 1984, the Japanese complied with this pledge and withdrew their objections to the amendment. The second part of the agreement was likewise conditioned on a

promise by the Japanese. If the Japanese agreed to cease all commercial whaling by April 1, 1988, then they may take up to 200 sperm whales in each of the 1986 and 1987 seasons, and take other species subject to limits acceptable to the United States, to be determined at a later time. The Japanese must withdraw their objection to the general moratorium by April 1, 1985, in order to avoid Packwood-Magnuson certification.

Even as the negotiations which led to the exchange of letters was taking place, the Japanese whaling fleet was out at sea to catch whales. On November 11, 1984, several members of the plaintiff organizations observed and photographed the return and butchering of two sperm whales at Wadaura, Japan. (Affidavit of J. Campbell Snowden). By letter dated November 19, 1985, counsel for the plaintiffs brought to the attention of the Secretary the fact of continued sperm whaling by the Japanese in violation of the IWC quotas, and requested immediate certification. On November 30, 1984, the Secretary, through the General Counsel of the National Oceanic and Atmospheric Administration, responded that he would

abide by the terms of the November 13 exchange of letters and would not certify Japan for the ongoing sperm whaling activities.

ANALYSIS

I. CERTIFICATION BY THE SECRETARY OF COMMERCE OF WHALING IN EXCESS OF THE IWC QUOTAS IS MANDATORY AND NONDISCRETIONARY.

When looking at the meaning of a statute, or a phrase therein, the Court must first look to the plain words of the statute. United States v. Apfelbaum, 445 U.S. 115, 121 (1980); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979). The Pelly Amendment states unequivocably that "when the Secretary of Commerce finds" that a nation is acting so as to "diminish the effectiveness" of an international fisheries conservation agreement to which the United States is a party, he "shall certify such fact to the President." 22 U.S.C. §1978(a)(2) (emphasis supplied). That this is a mandatory obligation of the Secretary's is borne out by the legislative history of the Pelly Amendment, which is replete with phrases such as "required to certify," "must

certify," and "directs the Secretary to certify." See, 117 Cong. Rec. 34751 and 47053 (1971); H.R. Rep. No. 468, 92d Cong., 1st Sess. 6 (1971). The Packwood-Magnuson Amendment was enacted with much the same language. Once the Secretary has determined that a nation is acting so as to diminish the effectiveness of the International Whaling Convention, he must certify that fact to the President. 16 U.S.C. §1821(e)(2)(A)(i). Neither statute provides a definition of this key phrase. Only when the words of the statute are ambigous or unclear is it proper for a court to resort to legislative history to derive the intent of the lawmakers. United States v. Turkette, 452 U.S. 576, 580 (1981); Petry v. Block, 697 F.2d 1169 (D.C. Cir. 1983). Because the phrase which triggers certification is not clearly defined in either statute, the Court will look to the legislative history of both Pelly and Packwood-Magnuson to determine its meaning.

The issue in this case is in actuality very simple. It is whether the Secretary has any discretion under the statute to determine what actions will trigger the automatic sanction. The

defendants agree with the plaintiffs that the Secretary has a mandatory duty to certify once the circumstances which the phrase "diminishes the effectiveness of the Convention" seeks to define are found to be present. Rather, they argue that the determination of those circumstances has been left in the hands of the Secretary as a threshold discretionary decision to be made before certification becomes mandatory.

Plaintiffs, in their reply memorandum, concede that the Secretary may in fact have some discretion in this area, but that he may not utilize that discretion in the face of violations of IWC quotas, which the plaintiff contends to be the specific protection for which Packwood-Magnuson was created. They refer to numerous quotes of legislative history and a history of consistant agency interpretation as the basis for this argument.

a) Fishing In Violation Of Quotas Established Under An International Convention Was The Specific Wrong To Which Congress Intended Both Pelly and Packwood-Magnuson To Apply.

It appears clear from the legislative history that Congress in 1971 specifically

had in mind the particular situation present in this case, of a member nation to an international fisheries agreement filing an objection which, although permitted by the terms of the agreement, rendered the agreement itself futile and ineffective. In enacting the Pelly Amendment, Congress cited, as a prime example of a situation which would call for certification, the flagrant overfishing of Atlantic salmon by nations that had filed timely objections to the international ban on such fishing. The objection procedures in use there are similar to that included in the Whaling Convention. Congressman Pelly explained that his Amendment was needed because "under the terms of the governing convention, individual nations are permitted to exempt themselves from the decisions of the commission." 117 Cong. Rec. 34751-52 (1971). These violations of the salmon quota were cited as the primary basis of the need for the United States to use its economic influence so as to reverse the trend. 117 Cong. Rec. 34754 (1971) (statement of Rep. Clausen). It is also apparent that the Pelly amendment was to apply to violations of the

International Whaling Convention:

> "The saga of the Atlantic salmon unfortunately is being repeated around the world with respect to many other creatures that inhabit the seas, most notably the whale. Commercial pressure has virtually wiped out the largest and most awesome species of whale. The International Whaling Convention, far from being a conservation measure, has proved to be a cloak for over-exploitation on a grand scale." 117 Cong. Rec. 34752 (1971) (statement of Rep. Pelly)

A review of the legislative history of the Pelly Amendment leaves no doubt that the primary purpose behind creating a certification and economic sanction mechanism was to penalize nations that evade international fishery conservation measures by invoking technical treaty rights to exempt themselves from these measures. It was an attempt by Congress to enforce compliance with these international efforts which lacked any real enforcement power of their own. Defendants fail to cite any authority which contradicts this proposition.

This interpretation was also the basis for the Executive Branch position on the Pelly Amendment. The Department of State representative testified on

July 8, 1971, that the State Department viewed the bill as providing that

> . . . "if the majority of nations did accept a regulation or a ban on salmon fishing and that regulation applied to U.S. fishermen, and one of the nations of the convention or one of the nations not a member didn't agree with it, as far as trade with the United States was concerned, that such trade restrictions would be applied to fishery products of that nation." 1971 House Hearings 394.

Likewise, the Commerce Department, by letter to the House Committee on Merchant Marine and Fisheries, stated that the bill would "authorize the President to impose sanctions against countries which do not abide by that ban whether or not they are members of [the convention] and whether or not, if members of [the convention], they have accepted the ban." H.R. Rep. No. 468, 92d Cong. 1st Sess. 10 (1971). It is clear that the problem Congress sought to address with the Pelly amendment was the ability of other nations to ignore international conservation programs by invoking exemption privileges provided for in the treaties. The Executive branch fully agreed.

Thus does the phrase "diminish the effectiveness of" take on meaning and purpose. While many actions might result in a determination by the Secretary that certification is required, Congress specifically and unequivocably intended that such certification be made in the face of a nation attempting to exempt itself from its international fishery conservation obligations.

It appears equally clear that Packwood-Magnuson used the phrase in exactly the same manner as it was intended to be used in Pelly. Packwood-Magnuson was enacted to put teeth into the certification process by eliminating the discretion given the Executive whether to apply sanctions or not. The legislative history shows no evidence that Congress intended to alter the meaning of this key phrase, or that the concern about foreign nations exempting themselves out of international fisheries treaties had in any way abated. Indeed, the discussions before the House Subcommittee on Fisheries and Wildlife Conservation and the Environment in 1979 clearly reflect that this concern was of paramount importance. Mr. Richard A.

Frank, then Administrator of the National Oceanic and Atmospheric Administration testified as follows:

> "We have used the Pelly amendment most recently in connection with Peru, Chile, and South Korea. They were the most flagerant violators because they were taking whales without regard to IWC quotas . . .
>
> ". . . IWC resolutions are not binding. If a country were violating something in the schedule, for example, taking more whales than the schedule provides, and that were a significant violation, I believe it is clear that the Pelly amendment would apply." Whaling Policy and International Whaling Commission Oversight, 96th Cong., 1st Sess. 311-12 (1979).

When asked later if he considered Japan to be at that time in violation of the convention, Mr. Frank replied, "no sir, we have not . . . They are not violating an IWC quota or an IWC prohibition." It was with this interpretation of the certification mechanism contained in Pelly that Congress enacted Packwood-Magnuson, which was endowed with the same language and the same certification trigger.

b) Agency Interpretation and Application Of Pelly And Packwood-Magnuson Has Consistently Resulted In Certification For Violations Of International Quotas.

The Executive Branch, prior to enactment of the Pelly Amendment in 1971, and until as recently as July 24, 1984, consistently has taken the position that intentional fishing in excess of duly established international quotas necessarily "diminishes the effectiveness" of the applicable fisheries conservation program. The Court has already quoted several examples of the Executive's position during the hearings on the Pelly amendment, and will not repeat them here except by reference. Similarly, it has already been noted that this position had not changed by the 1979 hearings on Packwood-Magnuson. Indeed, the Court is struck by the consistency and clarity of the position taken. This position has been echoed in the actions of the Executive as well as in its words.

One such example is found in Adams v. Vance, 570 F.2d 950 (D.C. Cir. 1978). This case involved the taking of bowhead whales by Alaskan natives. Although bowhead whales are one of the most endangered

species, small quotas had been allocated each year for the benefit of Alaskan natives because of the important role whaling has traditionally played in the Eskimo culture. In 1977, the IWC established no bowhead subsistance quota for 1978 based on IWC scientific findings. Although the Alaskan Eskimos vehemently opposed the decision, the United States did not file an objection which, under the terms of the Convention, would have resulted in an exemption to the zero quota. The Eskimos then filed suit to compel the Secretary of State to file an objection.

The objection sought by the Alaskans would have resulted in only a small number of bowhead whales being taken. However, the United States argued that the filing of an objection, even if later withdrawn, would have a devistating effect on the future effectiveness of the IWC and the Convention. Id. at 952. By affidavit, the Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs testified that "A United States objection at this time would seriously weaken the effectiveness of the IWC as an instrument

of conservation." (Mink Affidavit at 7, 8). Further, the Administrator of the National Oceanic and Atmospheric Administration from 1970 to July 1977 testified:

> "In my judgment, the ability of the United States to maintain its posture of international leadership in the protection of whales, and to justify the imposition of sanctions upon other nations which object to IWC quotas, depends upon its own scupulous observance of such quotas." (White Affidavit at 2, 3).

In light of this strong sense of leadership in the international whaling community reflected in the Executive's words and acts, it appears a complete reversal for the Secretary of Commerce to agree not to certify a foreign nation whose nationals are intentionally whaling in violation of established IWC quotas. The Court does not agree with the defendants' application of the holding in Adams. Defendant would have the Court use Adams as a vehicle for denying the plaintiffs relief on foreign policy grounds. However, that case involved a suit to force the Executive to perform a discretionary act, namely to file an

objection to the zero bowhead whale qucta, after the Executive had deliberated and decided that such an objection was not in the best interest of either the United States or the Convention. Here, plaintiffs are seeking to compel the performance of a non-discretionary duty on the part of the Secretary of Commerce to certify any nation which is intentionally whaling in violation of the IWC quotas.

Further, if the Executive could interpret the taking of 15 or 20 bowhead whales as a threat to the entire IWC structure, the Court cannot see how the taking of 1200 sperm whales over a four-year period when no IWC quotas are in effect and unknown numbers of minke and Bryde's whales "acceptable to the United States after consultation with the Government of Japan" over a two year period when no IWC quotas are in effect, could possibly be countenanced.

Finally, the December 13, 1984 exchange of letters is inconsistant with the Secretary's own interpretation of the law stated in correspondence with Sen. Packwood less than six months before. Sen. Packwood had written concerning the Secretary's interpretation as it would

apply to the complete moratorium on commercial whaling to go into effect at the begining of the 1986 whaling season. The Secretary responded as follows:

> "You noted in your letter the widespread view that any continued commercial whaling after the IWC moratorium decision takes effect would be subject to certification. I agree, since any such whaling attributable to the policies of a foreign government would clearly diminish the effectiveness of the IWC . . .
>
> "Any government that chooses to ignore the commercial whaling moratorium implemented by the IWC and thereby diminishes the effectiveness of the IWC should be prepared to accept the consequences of this non-compliance." Letter from Secretary of Commerce to Sen. Packwood (July 24, 1984).

It is inconceivable to this Court how the Secretary can reconcile his decision not to certify the Japanese sperm whaling with the clear purpose, intent and history of the law he is charged with enforcing, and with the equally consistent interpretation given that law by the agency and by the Secretary himself.

Therefore, there being no material facts in dispute, the plaintiffs' motion for summary judgment is granted, and the

defedants' cross-motion is denied.

c) The Intervenor's Motion For Summary Judgment Must Be Denied

The defendant-intervenors JWA/JFA have filed a motion for summary judgment which takes the position that the Secretary may never certify a nation which has filed a timely objection as provided for by the Convention. They argue extensively that the zero sperm whale quota and the general commercial whaling moratorium are illegal under the terms of the Convention and under international law. Therefore, the theory goes, if the quotas are themselves illegal, then Japan cannot be sanctioned for ignoring them. The intervenors also argue that certification is itself an illegal agency action, in violation of the Administrative Procedure Act, 5 U.S.C. §565, et seq., as the agency has never promulgated regulations defining the statutes, nor provided the Japanese with notice and hearing under 5 U.S.C. §556. Both of these arguments fail on their face and must be rejected by the Court.

Intervenors' entire discussion of the alleged impropieties which resulted

in the passage of the zero sperm whale quota and the general commercial whaling moratorium, while certainly offering some fascinating insights into the inner workings of such treaties, is entirely irrelevant to the issue in this case. This Court is not being asked to interpret or pass judgment on an international treaty or any actions taken as a result thereof. Rather, the only true issue in this case is whether there exists a nondiscretionary duty to certify and did the Secretary fail to so do. The relevant statutes make no mention of being applicable only to nations which are members of an international convention and which fail to timely object to the regulations of that convention. Rather, the plain words of both Pelly and Packwood-Magnuson operate to include any nation which "diminishes the effectiveness" of such a program. The statutes make no distinction between signatory or non-signatory, objector or non-objector. Indeed, in December of 1978, the Secretary certified Chile, Peru and South Korea under the Pelly Amendment at a time when none of these nations were members of the IWC.

Thus, it makes no difference that

the Japanese filed a valid objection, or whether the moratoria where "illegal." The statute only requires that the nation to be certified has acted so as to diminish the effectiveness of the Convention. The legislative history and consistant agency interpretation shows that any nation which exceeds the IWC quotas will be viewed as acting to diminish the effectiveness of the IWC and will be certified, regardless of the nations own view of the propriety of the quotas themselves.

Intervenors' Administrative Procedure Act argument is equally as facetious. Intervenor has ignored a fundamental of administrative law, that notice and hearing are only required for the taking of rights or property. Here, what is being taken is a revocable license, the license given to a foreign country to come into United States waters and fish. This is a privelege which does not give rise to a property right of the Japanese. See, United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950). Further, it is clear that Section 556 of the APA, 5 U.S.C. §556, only sets forth the procedural rights that are available

when a trial-type hearing is required. Section 554 of the APA states that such a hearing is required "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing . . ." 5 U.S.C. §554(a). Accord, Wong Yang Sung v. McGrath, 339 U.S. 33 (1950); Sea-Land Service, Inc. v. Federal Maritime Commission, 653 F.2d 544, 551 n.18 (D.C. Cir. 1981); Marathon Oil Company v. Environmental Protection Agency, 564 F.2d 1253, 1263-64 (D.C. Cir. 1977). Neither Pelly nor Packwood-Magnuson require that a determination be made after a trial-type hearing on the record. Thus there has been no violation of either §556 or §554 of the APA.

Even assuming arguendo that these statutes did require a hearing with respect to certification, plaintiffs would still be entitled to the relief they seek. The sole factual issue to be determined prior to certification is whether the Japanese are taking sperm whales in excess of the established IWC zero quota. Because that fact is established in this Court proceeding, and is stipulated to by all parties, there is

no factual issue to be resolved by an evidentiary hearing. Cerro Wire & Cable Co. v. Federal Energy Regulatory Commission, 677 F.2d 124, 128-9 (D.C. Cir. 1982).

Nor is the Secretary required by law to adopt substantive interpretive regulations prior to exercising his duty to certify. The Supreme Court specifically rejected that argument in SEC v. Chenery Corp., 332 U.S. 194 (1947), holding that to require proceedings initially by rulemaking "would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise." Id. at 202. This holding has continued to be followed to this day. See, National Labor Relations Board v. Bell Aerospace Co., 416 U.S. 267 (1974); Towns of Concord, Norwood and Wellesley, Massachusetts v. Federal Energy Regulatory Commission, 729 F.2d 824, 830 (D.C. Cir. 1984); Arkansas Power and Light Co. v. Interstate Commerce Commission, 725 F.2d 716, 723 (D.C. Cir. 1984). The case on which Intervenors rely, Morton v. Ruiz, 415 U.S. 199 (1974), merely stands for the proposition that if an agency promulgates interpretive rules, it must do so

in conformance with APA procedures.

Further, intervenor's argument that an earlier treaty must take precedence over a later act of Congress does not apply in this case. The Supreme Court has held on numerous occasions for more than a century that such a treaty is subject to "such acts as Congress may pass for its enforcement, modification, or repeal." Head Money Cases, 112 U.S. 580, 599 (1884). See also, Moser v. United States, 341 U.S. 41 (1951); Pigeon River Improvement Slide & Boom Co. v. Charles W. Cox. Ltd., 291 U.S. 138, 160 (1934); United States v. Payne, 264 U.S. 446, 448 (1924). Even without this authority, the Court does not view the Pelly and Packwood-Magnuson Amendments as conflicting with the Convention. There is nothing in the Convention which states that upon ratification of the treaty the United States gave up its right to persuade other nations to comply with the IWC whaling quotas established pursuant to that very convention. The Convention provides that Japan may exempt itself from IWC quotas by filing a timely objection. No provision of the Convention, however, restricts the right of any other

party to impose unilateral sanctions to enforce these same quotas, which is what the statutes at issue provide for, and what the plaintiffs seek here.

Finally, Intervenor's argument that the doctrine of primary jurisdiction should apply is incorrect. This case is a simple issue of statutory interpretation. Questions of law are particularly within the competence of the judiciary to resolve, and are not subject to initial agency consideration under the primary jurisdiction doctrine. Nader v. Allegheny Airlines, 426 U.S. 290, 305-6 (1976); Great Northern Ry. Co. v. Merchant's Elevator Co., 259 U.S. 285, 290-91 (1922).

II. THE MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED IS DENIED AS THE INCORRECT LEGAL STANDARD HAS BEEN APPLIED AND AS AN INJUNCTION IN THE NATURE OF MANDAMUS IS PROPER WHERE, AS HERE, A NONDISCRETIONARY ACT IS INVOLVED.

Intervenors have filed a motion to dismiss the complaint for failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). As basis for this motion, the cite Virginia

Petroleum Jobbers Association v. Federal Power Commission, 259 F.2d 921 (D.C. Cir. 1958). Further, they argue that the Secretary does have discretion to determine what actions "diminish the effectiveness" of the Convention, therefore making the remedy of mandamus unavailable. The Court finds neither argument to be convincing, and, therefore, denies the motion.

Initially, as has been discussed above, when a foreign nation intentionally takes whales in excess of an established IWC quota, that action necessarily diminishes the effectiveness of the Convention and automatically triggers certification. That has been the consistant legislative and agency interpretation for almost fifteen years. Therefore, this is a nondiscretionary ministerial duty for which relief in the nature of mandamus is appropriate. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). See also, Mississippi v. Johnson, 71 U.S. (4 Wall) 475, 498 (1866); 13th Regional Corporation v. U. S. Dept. of Interior, 654 F.2d 758, 760 (D.C. Cir. 1980).

This is certainly such a case as envisioned by the law cited above. Congress created in 1971 a mandatory duty

on the part of the Secretary of Commerce to certify actions of foreign nationals that diminish the effectiveness of international fishery conservation programs. It added in 1979 a mandatory economic sanction required to be imposed by the Secretary of State in the case of the certification of actions that specifically diminish the International Convention for the Regulation of Whaling. The obligation to act is preemptory and clearly defined. The law not only authorizes the demanded action, but requires it. Nothing is left for discretion. Almost fifteen years of administrative interpretation and congressional understanding of, and reliance upon, the interpretation that intentional whaling in violation of IWC quotas triggers the certification process, have established a clear meaning of the phrase. There is quite simply nothing for the Secretary to decide. He must certify under the plain meaning of the statute.

Intervenors argue that plaintiffs have failed to meet the four-part test laid out in Virginia Petroleum Jobbers, supra. However, the Court is in agreement with the plaintiffs that that case

has no application to a request for a permanent injunction. Here, plaintiffs' motion for summary judgment seeks a final determination of the merits of the case and an award of permanent relief. Thus, Virginia Petroleum Jobbers is irrelevant for purposes of this case.

The correct standard to be applied in a case such as this is that enunciated in Council of and for the Blind of Delaware County Valley v. Regan, 709 F.2d 1521, 1533 (D.C. Cir. 1983), which established a three-pronged test for mandamus relief. Such relief is available if "(1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to the plaintiff." Id. Plaintiffs have passed all three prongs in this case and are therefore entitled to the permanent injunction which they seek. Plaintiffs have a clear right to relief and defendants have a clear duty to act, as discussed above. Most importantly, there is no other remedy available which will have the same effect of accomplishing the plaintiffs' purpose. Plaintiffs seek to protect and preserve whale stock left on this planet after

years of systematic decimation. Pelly and Packwood-Magnuson were enacted to this same end, and plaintiffs now seek to compel the Secretary to invoke these statutes as is his duty. There is no other form of relief available which would serve the same purpose. No amount of damages or alternative action by the defendants would have the same effect. Therefore, the motion to dismiss is denied, and the permanent injunction will issue under 28 U.S.C. §1361.

CONCLUSION

The Court holds here that the Secretary of Commerce had a clear and non-discretionary duty to certify the Japanese whaling in excess of the established IWC quotas. By not doing so, the Secretary has ignored the plain intent of Congress, and the historic significance of United States sanctions in the sphere of international whale conservation. The Secretary of Commerce may not unilaterally, or even bilaterally with the Japanese, dismiss the mandate of the IWC so as to proceed with his own particular vision of whale preservation. Congress has not given him that authority, and has, in

fact, explicitly created an automatic sanction to prevent this very situation. Congress, in enacting Pelly in 1971 and Packwood-Magnuson in 1979, wanted to send out a clear message to the world that the United States was committed to being in the vanguard of the fight to preserve the whale. The Secretary may not now distort his clear Congressional mandate by permitting a foreign nation (here Japan) to violate the IWC quotas without that nation facing the immediate consequences as set forth by the above-mentioned statutes.

In view of the foregoing, the Court, by Order of even date herewith, will grant the plaintiffs' motion for summary judgment, deny the defendants' motion for summary judgment and deny the defendant intervenors' motions for summary judgment and to dismiss, and order the defendants Baldridge and Schultz to immediately certify to the President that Japan is in violation of the IWC sperm whaling quota and enjoin them permanently from agreeing not to reduce, or failing to reduce, Japanese fishing quotas in consequence of such certification, and thus save another vital national, if not

international, goal of the preservation of an almost extinct species of vital importance to humankind.

March 5, 1985
date

/s/ Charles R. Richey
Charles R. Richey
United States District Judge

APPENDIX C

ORDERS OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DENYING PETITION FOR REHEARING

United States Court of Appeals
for the District of Columbia Circuit

No. 85-5251

American Cetacean Society, et al.

v.

Malcolm Baldridge, Secretary of Commerce, et al.
And Consolidated Case No. 85-5252

BEFORE: Wright, Circuit Judge; and Oberdorfer, United States District Judge for the District of Columbia*

O R D E R

Upon consideration of the petition for rehearing of apellants' Japan Fisheries Association, et al., it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT

/s/ George A. Fisher

GEORGE A. FISHER, CLERK

*Sitting by designation pursuant to 28 U.S.C. §292(a).

Judge Tamm was a member of the panel that heard oral argument and decided this case. He died on September 22, 1985, and did not participate in the making of this order.

United States Court of Appeals
for the District of Columbia Circuit

No. 85-5251

American Cetacean Society, et al.

v.

Malcolm Baldridge, Secretary of Commerce, et al.
And Consolidated Case No. 85-5252

BEFORE: Robinson, Chief Judge; Wright, Edwards, Ginsburg, Bork, Scalia and Starr, Circuit Judges

O R D E R

The suggestion for rehearing en banc of appellant Japan Fisheries Association, et al., has been circulated to the full Court and a majority of the active judges of the Court have not voted in favor thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court en banc, that the suggestion is denied.

Per Curiam
FOR THE COURT

/s/ George A. Fisher

GEORGE A. FISHER, CLERK

Judges Ginsburg, Bork, Scalia and Starr would grant rehearing en banc and are in substantial agreement with the views expressed in Judge Oberdorfer's dissent from the panel opinion.

United States Court of Appeals
for the District of Columbia Circuit

No. 85-5251

American Cetacean Society, et al.

v.

Malcolm Baldridge, Secretary of Commerce, et al.
And Consolidated Case No. 85-5252

BEFORE: Wright, Circuit Judge; and Oberdorfer, United States District Judge for the District of Columbia*

O R D E R

Upon consideration of the federal appellants' petition for rehearing, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT

/s/ George A. Fisher

GEORGE A. FISHER, CLERK

*Sitting by designation pursuant to 28 U.S.C. §292(a).

Judge Tamm was a member of the panel that heard oral argument and decided this case. He died on September 22, 1985, and did not participte in the making of this order.

United States Court of Appeals
for the District of Columbia Circuit

No. 85-5251

American Cetacean Society, et al.

v.

Malcolm Baldridge, Secretary of Commerce, et al.
And Consolidated Case No. 85-5252

BEFORE: Robinson, Chief Judge; Wright, Edwards, Ginsburg, Bork, Scalia and Starr, Circuit Judges

O R D E R

The suggestion for rehearing en banc of the federal appellants has been circulated to the full Court and a majority of the active judges of the Court have not voted in favor thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court en banc, that the suggestion is denied.

Per Curiam
FOR THE COURT

/s/ George A. Fisher

GEORGE A. FISHER, CLERK

Judges Ginsburg, Bork, Scalia and Starr would grant rehearing en banc and are in substantial agreement with the views expressed in Judge Oberdorfer's dissent from the panel opinion.

APPENDIX D

Embassy of Japan
2520 Massachusetts Avenue, N.W.
Washington, D.C. 20008

November 13, 1984

Dear Mr. Secretary:

I am writing to you concerning the recent meetings between the representatives of the Government of Japan and the Government of the United States on the subject of commercial sperm whaling in the western division stock of the North Pacific.

As you know, the Government of Japan is keenly aware that the whaling issue poses a threat of friction between our two countries. The Government of Japan wishes to resolve this issue as quickly and amicably as possible to avoid a confrontation which might be caused by the application of United States domestic statutes, namely Section 8(a) of the Fishermen's Protective Act (the Pelly Amendment) and Section 201(e)(2) of the Magnuson Fishery Conservation and Management Act (the Packwood-Magnuson Amendment).

Unfortunately, while both Governments are Parties to the International Convention for the Regulation of Whaling (the Convention) and while we both share the concern for the general objectives of the Convention, there are certain differences between our two countries which arise from our different cultural and domestic situations.

As you know, footnote 1 added in 1981 to Table 3 of the Schedule to the Convention prohibits the commercial harvest of sperm whales from the

western division stock of the North Pacific unless the International Whaling Commission affirmatively decides otherwise. The Government of Japan has lodged an objection to footnote 1, in accordance with the provision of paragraph 3 of Article V of the Convention, and is therefore not bound by the footnote.

The Government of Japan, recognizing the need to take measures including the withdrawal of the objection mentioned above in order to avoid a confrontation between our two countries, seeks an additional period of time for the purpose of minimizing the economic and social hardship of those who are engaged in commercial sperm whaling. The Government of Japan endeavors to take appropriate measures in order to meet this purpose.

I therefore request that, as long as Japanese commercial whaling is conducted in a manner as indicated in the arrangement set forth in the Summary of Discussions attached to this letter, you not consider that the whaling will diminish the effectiveness of the Convention or its conservation program and not certify such whaling as provided for in the Pelly Amendment or the Packwood-Magnuson Amendment.

Sincerely yours,

/s/ Yasushi Murazumi
Yasushi Murazumi
Charge d'Affaires ad interim
of Japan

The Honorable
Malcolm Baldrige
The Secretary of Commerce
Washington, D.C. 20230

SUMMARY OF DISCUSSIONS ON COMMERCIAL SPERM WHALING IN THE WESTERN DIVISION STOCK OF THE NORTH PACIFIC, NOVEMBER 1-12, 1984, WASHINGTON, D.C.

DR. JOHN V. BYRNE, United States Commissioner to the International Whaling Commission

MR. HIROYA SANO, Director-General, Fisheries Agency, Ministry of Agriculture, Forestry and Fisheries, the Government of Japan

The latest in a series of bilateral discussions between Japan and the United States were conducted in Washington, D.C., November 1-12, 1984, in an effort to determine whether it would be possible, in accordance with the laws and regulations in effect in each country, to develop an arrangement whereby the United States Secretary of Commerce might refrain from "certifying" sperm whaling by Japanese nationals, if they take sperm whales under the objection of the Government of Japan to footnote 1 to Table 3 of the Schedule to the International Convention for the Regulation of Whaling, 1946 (the Convention). The heads of the delegations shared the view that such an arrangement might be possible, subject to satisfactory resolution of certain details and to approval and implementation by the cognizant authorities of each Government. The essential points of such a possible arrangement would be the following:

1. (A) The Government of Japan may permit a catch of 400 sperm whales during each of the 1984 and 1985 coastal seasons, subject to the provisions

on by-catch of females as set forth in footnote 2 to Table 3 of the Schedule (dated November, 1983) to the Convention.

(B) If, by December 13, 1984, the Government of Japan withdraws its objection, lodged November 9, 1981 under paragraph 3 of Article V of the Convention, effective on or before April 1, 1988, the United States would not consider sperm whaling permitted under sub-paragraph (A) above to diminish the effectiveness of the Convention or its conservation program, and would therefore not certify such sperm whaling as provided for in Section 8(a) of the Fishermen's Protective Act (the Pelly Amendment) or Section 201(e)(2) of the Magnuson Fishery Conservation and Management Act (The Packwood-Magnuson Amendment).

2. If, by April 1, 1985, the Government of Japan withdraws its objection, lodged November 4, 1982, to paragraph 6(e) of the Schedule, effective such that Japanese commercial coastal whaling will cease following the 1987 coastal season and Japanese commercial pelagic whaling will cease following the 1986/87 pelagic season, the United States would not consider that whaling specified below would diminish the effectiveness of the Convention or its conservation program and would not certify such whaling under the Pelly Amendment or the Packwood-Magnuson Amendment, if such whaling were limited to the following species and catch limits:

1986 and 1987 Coastal Whaling Seasons

Western Division, North Pacific sperm whales -- 200 per season, subject to the provisions on by-catch of females as set forth in footnote 2 to Table 3 of the

Schedule (dated November, 1983) to the Convention;

Okhotsk Sea-West Pacific minke whales -- catch limits acceptable to the Government of the United States after consultation with the Government of Japan;

Western North Pacific Bryde's whales -- catch limits acceptable to the Government of the United States after consultation with the Government of Japan; and

1985/1986 and 1986/1987 Pelagic Whaling Seasons

Southern Hemisphere minke whales Catch limits acceptable to the Government of the United States after consultation with the Government of Japan.

The Secretary of Commerce
Washington, D.C. 20230

November 13, 1984

Mr. Yasushi Murazumi
Charge d'Affaires ad interim
of Japan
Embassy of Japan
2520 Massachusetts Avenue, N.W.
Washington, D.C. 20008

Dear Mr. Murazumi:

Thank you for your letter about the recent bilateral consultations between representatives of our governments on the Japanese harvest of sperm whales from the western division stock of the North Pacific and the possibility that I, as Secretary of Commerce, may certify any confirmed harvest of sperm whales by Japanese nationals.

After consulting with the United States Commissioner to the International Whaling Commission (IWC), I have concluded that commercial harvests of whales by Japanese nationals within the limits and under the circumstances set forth in the Summary of Discussions attached to your letter would not diminish the effectiveness of the International Convention for the Regulation of Whaling, 1946, or its conservation program.

The reports of the IWC's Scientific Committee, as well as the IWC's 1982 decision to permit quotas of 450 and 400 whales for the 1982 and 1983 coastal sperm whaling seasons, respectively, indicate that sperm whaling in accordance with

paragraph 1 of the Summary of Discussions attached to your letter is not inconsistent with the IWC's essential conservation purposes. Moreover, in deciding that Japanese commercial whaling in accordance with paragraph 2 of that Summary of Discussions would not thwart the essential conservation purposes of the IWC, I have noted the apparent purpose of the IWC in having itself provided for a delayed effective date of paragraph 10(e).

This arrangement does not insulate from certification any Japanese whaling in excess of the 1984-85 quota for Southern Hemisphere minke whales. I urge that the Government of Japan comply with that quota. Furthermore, the withdrawals of your government's objections to footnote 1 to Table 3 and paragraph 10(e) of the Schedule would be irrevocable, notwithstanding their prospective effective dates.

Finally, in judging whether the Government of the United States would accept the catch limits for the 1986 and 1987 coastal seasons and 1985/86 and 1986/87 pelagic seasons as contemplated in paragraph 2 of the Summary of Discussions, the Government of the United States would be guided by the most recent quota voted by the IWC prior to those seasons.

Our purpose in recent consultations with the Government of Japan has been to encourage adherence by the Government of Japan to all provisions of the Convention's Schedule. We regard the provisions of paragraph 10(e) of the Schedule to be of central importance to the rational conservation and management of the world's remaining whale stocks. This is reflected in President Reagan's 1981 letter to each of the IWC

Commissioners encouraging them to take action along the lines now reflected in paragraph 10(e) of the Schedule.

Sincerely,

/s/ Malcolm Baldrige
Malcolm Baldrige
Secretary of Commerce

D9

[Letter to Secretary of Commerce Baldrige]

Ministry of Foreign Affairs
Tokyo, Japan

April 5, 1985

Dear Mr. Secretary,

As a result of the recent talks held in Washington, D.C. between you and Mr. H. Sano, Director-General of the Fisheries Agency of Japan, I refer to:

- the objection lodged by the Government of Japan on November 4, 1982 to subparagraph 10(e) of the Schedule to the International Convention for the Regulation of Whaling, 1946 (the Convention),

- the arrangements on commercial whaling reflected in the letters exchanged between you and then Charge d'Affaires ad interim Mr. Y. Murazumi on November 13, 1984, and

- the order dated March 5, 1985 of the United States District Court for the District of Columbia in the lawsuit styled American Cetacean Society, et al. v. Baldrige, et al., and the stay of such order pending appeal, granted on March 18, 1985 by the United States Court of Appeals for the District of Columbia Circuit.

I am authorized to inform you that the Government of Japan will, by written notice to the International Whaling Commission (IWC), withdraw the aforementioned objection within five days of a decision by the Court of Appeals in favor of the United States Government. My Government's

withdrawal would be effective such that Japanese commercial coastal whaling will cease following the 1987 coastal season and Japanese commercial pelagic whaling will cease following the 1986/87 pelagic season, but would lapse by its own terms only if at any time before the end of the 1987 commercial coastal whaling season, the United States Secretary of Commerce receives a final, unappealable order from any United States court of competent jurisdiction requiring certification of Japanese whaling activities which are addressed by, and consistent with, the arrangements reflected in the exchange of letters referred to above.

With regard to the catch limits for the 1986 and 1987 coastal season (except those for the Western Division, North Pacific Sperm Whales) and the 1985/86 and 1986/87 pelagic seasons as contemplated in the November 13, 1984 arrangements, I wish to inform you that the Government of Japan understands that the United States will not regard catch limits for those seasons as diminishing the effectiveness of the Convention or its conservation program if such catch limits are consistent with the decisions made at the 36th Annual Meeting of the IWC, unless the levels of the stocks in question as assessed by the Scientific Committee of the IWC at its future meetings, change significantly.

Finally, I wish to confirm the understanding of the Government of Japan that (i) the date of April 1, 1985 referred to in paragraph 2 of the Summary of Discussions appended to Mr. Murazumi's letter to you of November 13, 1984 shall be deemed extended to a date five days after the Court of Appeals shall enter an order in favor of the United States Government in the litigation described above, and (ii) withdrawal of the objection of the

Government of Japan to paragraph 10(e) of the Schedule to the Convention on the terms, conditions and understandings set forth in this letter shall be deemed by the United States to satisfy the condition referred to in paragraph 2 of the Summary of Discussions referred to above. I request that you confirm the understandings of my Government in your reply to this letter.

Sincerely,

/s/ Shintaro Abe
Shintaro Abe
Minister for Foreign Affairs
of Japan

THE SECRETARY OF COMMERCE
Washington, D.C. 20230

His Excellency
Shintaro Abe
Minister of Foreign Affairs of Japan
Tokyo

Dear Mr. Minister:

I acknowledge the receipt of your letter dated April 5, 1985, regarding Japan's intentions with respect to its pending objection to paragraph 10(3) of the Schedule to the International Convention for the Regulation of Whaling. I hereby inform you the Government of the United States concurs with the understandings of the Government of Japan, as described in your letter.

Sincerely

/s/ Clarence Brown
Acting Secretary of
Commerce

INTERNATIONAL CONVENTION FOR THE REGULATION OF WHALING
Dec 2, 1946, 62 Stat. 1716, 161 U.S.T. 72, T.I.A.S. No. 1949 (Excerpts)

The Governments whose duly authorized representatives have subscribed hereto,

Recognizing the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks;

* * *

Recognizing that the whale stocks are susceptible of natural increases if whaling is properly regulated, and that increases in the size of whale stocks will permit increases in the numbers of whales which may be captured without endangering these natural resources;

Recognizing that it is in the common interest to achieve the optimum level of whale stocks as rapidly as possible without causing widespread economic and nutritional distress;

* * *

Desiring to establish a system of international regulation for the whale fisheries to ensure proper and effective conservation and development of whale stocks on the basis of the principles embodied in the provisions of the International Agreement for the Regulation of Whaling signed in London on June 8, 1937 and the protocols to that Agreement signed in London on June 24, 1938 and November 26, 1945; and

Having decided to conclude a convention to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry;

Have agreed as follows:

* * *

ARTICLE V

* * *

1. The Commission may amend from time to time the provisions of the Schedule by adopting regulations with respect to the conservation and utilization of whale resources, fixing (a) protected and unprotected species; (b) open and closed seasons; (c) open and closed waters, including the designation of sanctuary areas; (d) size limits for each species; (e) time, methods, and intensity of whaling (including the maximum catch of whales to be taken in any one season); (f) types and specifications of gear and apparatus and appliances which may be used; g) methods of measurement; and (h) catch returns and other statistical and biological records.

2. These amendments of the Schedule (a) shall be such as are necessary to carry out the objectives and purposes of this Convention and to provide for the conservation, development, and optimum utilization of the whale resources; (b) shall be based on scientific findings; . . . and (d) shall take into consideration the interests of the consumers of whale products and the whaling industry.

3. Each of such amendments shall become effective with respect to the Contracting Governments ninety

days following notification of the amendment by the Commission to each of the Contracting Governments, except that (a) if any Government presents to the Commission objection to any amendment prior to the expiration of this ninety-day period, the amendment shall not become effective with respect to any of the Governments for an additional ninety days; (b) thereupon, any other Contracting Government may present objection to the amendment at any time prior to the expiration of the additional ninety-day period, or before the expiration of thirty days from the date of receipt of the last objection received during such additional ninety-day period, whichever date shall be later; and (c) thereafter, the amendment shall become effective with respect to all Contracting Governments which have not presented objection but shall not become effective with respect to any Government which has so objected until such date as the objection is withdrawn. The Commission shall notify each Contracting Government immediately upon receipt of each objection and withdrawal and each Contracting Government shall acknowledge receipt of all notifications of amendments, objections, and withdrawals.

* * *

PELLY AMENDMENT
Fishermen's Protective Act § 8(a), 85 Stat. 768, 22 U.S.C. § 1978(a)(Excerpts)

Restriction on importation of fishery or wildlife products from countries which violate international fishery or endangered or threatened species programs

Certification to President

(a) (1) When the Secretary of Commerce determines that nationals of a foreign country, directly or indirectly, are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program, the Secretary of Commerce shall certify such fact to the President.

(2) When the Secretary of Commerce or the Secretary of the Interior finds that nationals of a foreign country, directly or indirectly, are engaging in trade or taking which diminishes the effectiveness of any international program for endangered or threatened species, the Secretary making such finding shall certify such fact to the President.

(3) Upon receipt of any certification made under paragraph (1) or (2), the President may direct the Secretary of the Treasury to prohibit the bringing or the importation into the United States of fish products (if the certification is made under paragraph (1)) or wildlife products (if the certification is made under paragraph (2)) from the offending country for such duration as the President determines appropriate and to the extent

that such prohibition is sanctioned by the General Agreement on Tariffs and Trade.

Notification to Congress

(b) Within sixty days following certification by the Secretary of Commerce or the Secretary of the Interior, the President shall notify the Congress of any action taken by him pursuant to such certification. In the event the President fails to direct the Secretary of the Treasury to prohibit the importation of fish products or wildlife products of the offending country, or if such prohibition does not cover all fish products or wildlife products of the offending country, the President shall inform the Congress of the reasons therefor.

Importation of Fish Products From Offending Country Prohibited

(c) It shall be unlawful for any person subject to the jurisdiction of the United States knowingly to bring or import into, or cause to be imported into, the United States any fish products or wildlife products prohibited by the Secretary of the Treasury pursuant to this section.

* * *

PACKWOOD - MAGNUSON AMENDMENT
Magnuson Fishery Conservation and Management Act § 201(e)(2), 90 Stat. 337, 16 U.S.C. § 18321(e)(2)(Excerpts)

* * *

(e)(2) (A) For the purposes of this paragraph --

(i) The term "certification" means a certification made by the Secretary that nationals of a foreign country, directly or indirectly, are conducting fishing operations or engaging in trade or taking which diminishes the effectiveness of the International Convention for the Regulation of Whaling. A certification under this section shall also be deemed a certification for the purposes of section 8(a) of the Fishermen's Protective Act of 1967 (22 U.S.C. 1978(a)).

(ii) The term "remedial period" means the 365-day period beginning on the date on which a certification is issued with respect to a foreign country.

(B) If the Secretary issues a certification with respect to any foreign country, then each allocation under paragraph (1) [201(e)(1), 16 U.S.C. § 1821(e)(1)(A)] that --

(i) is in effect for that foreign country on the date of issuance; or

(i) is not in effect on such date but would, without regard to this paragraph, be made to the foreign country within the remedial period;

shall be reduced by the Secretary of State, in consultation with the Secretary, by not less than 50 percent.

* * *